

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

INTEGRA LIFESCIENCES CORP., INTEGRA
LIFESCIENCES SALES LLC, CONFLUENT
SURGICAL, INC., AND INCEPT LLC,

Plaintiffs,

v.

HYPERBRANCH MEDICAL TECHNOLOGY,
INC.,

Defendant.

Civil Action No. 15-819-LPS-CJB

REDACTED - PUBLIC VERSION

**EXHIBIT 1 TO
PLAINTIFFS' MOTION FOR REDACTIONS TO THE TRANSCRIPT
OF THE MAY 15, 2018 FINAL PRETRIAL CONFERENCE**

Of Counsel:

YOUNG CONAWAY STARGATT & TAYLOR LLP

Robert F. Altherr, Jr.
Christopher B. Roth
BANNER & WITCOFF, LTD.
1100 13th Street NW
Suite 1200
Washington, DC 20005
Telephone: (202) 824-3000

Karen L. Pascale (#2903) [kpascale@ycst.com]
James L. Higgins (#5021) [jhiggins@ycst.com]
Rodney Square
1000 North King Street
Wilmington, DE 19801
Telephone: (302) 571-6600

John P. Iwanicki
BANNER & WITCOFF, LTD.
28 State Street, Suite 1800
Boston, MA 02109
Telephone: (617) 720-9600

*Attorneys for Plaintiffs, Integra LifeSciences
Corp., Integra LifeSciences Sales LLC, Confluent
Surgical, Inc., and Incept LLC*

Jason S. Shull
Matthew P. Becker
BANNER & WITCOFF, LTD.
Ten South Wacker
Suite 3000
Chicago, IL 60606
Telephone (312) 463-5000

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FOR THE DISTRICT OF DELAWARE

INTEGRA LIFESCIENCES CORP.)	
INTEGRA LIFESCIENCES SALES, LLC,)	
CONCLUENT SURGICAL, INC., and)	
INCEPT, LLC,)	
)	
Plaintiffs,)	
)	Case No.
v.)	15-819-LPS-CJB
)	
HYPERBRANCH MEDICAL TECHNOLOGY,)	
INC.,)	
)	
Defendant.)	

Tuesday, May 15, 2018
8:38 a.m.
Courtroom 6B

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE LEONARD P. STARK
United States Chief District Court Judge

APPEARANCES:

YOUNG CONAWAY STARGATT & TAYLOR
BY: KAREN PASCALE, ESQ.

-and-

BANNER & WITCOFF, LTD
BY: ROBERT F. ALTHERR, JR., ESQ.
BY: JOHN P. IWANICKI, ESQ.
BY: CHRISTOPHER ROTH, ESQ.

Counsel for the Plaintiffs

MORRIS NICHOLS ARSHT & TUNNELL, LLP
BY: THOMAS C. GRIMM, ESQ.
BY: JEREMY TIGAN, ESQ.

-and-

COOLEY, LLP
BY: JONATHAN GRAVES, ESQ.
BY: ADAM PIVOVAR, ESQ.
BY: STEPHEN CRENSHAW, ESQ.

Counsel for the Defendant

1 THE COURT: Good morning, everybody.
2 Please be seated. I'll have you start by putting
3 your appearances on the record for us, please.

4 MS. PASCALE: Good morning, Your
5 Honor.

6 THE COURT: Good morning.

7 MS. PASCALE: Karen Pascale from
8 Young Conaway for the plaintiffs. If I may
9 introduce from Banner & Witcoff, this is Robert
10 Altherr, John Iwanicki and Christopher Roth.

11 THE COURT: Good morning.

12 MR. GRIMM: Good morning, Your
13 Honor. Thomas Grimm, Morris, Nichols, Arsht &
14 Tunnell for defendant HyperBranch. My partner,
15 Jeremy Tigan is with me this morning as are our
16 colleagues from the Cooley firm who you have met
17 before, Jonathan Graves, Adam Pivovar and
18 Stephen Crenshaw.

19 THE COURT: Welcome again to all
20 of you.

21 So we're here for the pretrial
22 conference for the jury trial that is going to
23 begin on May 29th. And we have a pretty busy
24 agenda at least from my end this morning. Let

1 me tell you the order in which I generally plan
2 to raise the various issues that I'm aware of
3 and, of course, you'll have a chance to raise
4 any other issues provided we have time after all
5 of this.

6 I want to first talk about the
7 whole set of claim construction questions and
8 whether or not anybody is trying to admit
9 opinions or evidence inconsistent with the
10 Court's claim construction. After that, I want
11 to talk about the defendant's motion to sever
12 and stay the proceedings with respect to claim
13 10 of the '034 patent.

14 I want to talk after that about
15 the plaintiff's motion for reconsideration of
16 certain aspects of our rulings on the motions in
17 limine.

18 Then we'll talk about the
19 defendant's objections to the R&R regarding
20 summary judgment related to claim 10 of the '034
21 patent.

22 Most likely after that we'll go
23 through the list of other issues that I
24 identified in my order the other day that we saw

1 as open issues after reviewing the pretrial
2 order. We'll talk about some of the mechanics
3 of how we'll run the courtroom and what the
4 trial will look like, and we'll see if you all
5 have other issues besides those that I have
6 identified.

7 Before we jump into that, any
8 questions from the plaintiff?

9 MR. ALTHERR: No, Your Honor.

10 THE COURT: And how about from the
11 defendant?

12 MR. GRAVES: No, Your Honor.

13 THE COURT: Okay. Then let's
14 start on these claim construction questions. We
15 got the submission yesterday. And I guess let's
16 first start with the issues that the plaintiffs
17 have raised where they think the defendants are
18 going to offer evidence and argument that is
19 inconsistent with the Court's claim
20 construction.

21 And just as an initial matter, let
22 me confirm with the defendants, do you intend to
23 offer evidence and argument that the plaintiffs
24 have identified, because if you don't, that will

1 cut the discussion short?

2 MR. PIVOVAR: I can address that
3 briefly, Your Honor.

4 THE COURT: Sure.

5 MR. PIVOVAR: The answer to that
6 really is yes because how we took your order of
7 Friday was to essentially help you identify
8 specific issues that have been disputed between
9 the parties already and for which there has been
10 some resolution by the Court of a claim
11 construction dispute that had been adverse one
12 side or the other that would sweep all of a
13 certain expert's opinion into that camp.

14 And what's really happened here,
15 Your Honor, is they've essentially identified
16 everything that our expert has on
17 noninfringement of these predetermined thickness
18 claims. And there are a lot of different claim
19 constructions there.

20 If you look at the order from
21 Judge Burke on the Daubert issue, he said your
22 expert applied the same thing and you look at
23 one little small thing. They have taken that as
24 we can take a run at knocking out all the

1 opinions on noninfringement and invalidity for
2 the entirety of everything your experts have
3 there. So we think it's become kind of an
4 overreach from plaintiffs on that. We do intend
5 to pursue that.

6 THE COURT: All right. Let me get
7 somebody from the plaintiffs up here and let me
8 make sure I understand what it is you think the
9 defendants are going to do that is inconsistent.
10 And first let me say, even though it was pretty
11 lengthy what you put together for us, at the end
12 of the day it seemed to me that everything
13 you're challenging relates to the predetermined
14 thickness limitation. Is that correct?

15 MR. IWANICKI: Well, for the most
16 part, Your Honor, there is one indefiniteness
17 rejection with respect to claim 10. And let me
18 -- it's at section C, defendant's opinion that
19 claim 10 of the '034 patent is indefinite is not
20 consistent with the Court's claim construction.

21 THE COURT: Other than that,
22 everything else in those eleven pages relates to
23 predetermined thickness; is that right?

24 MR. IWANICKI: Yes, Your Honor.

1 THE COURT: Let's talk about
2 predetermined thickness and we'll come to your
3 other one after we talk through this one.

4 MR. IWANICKI: Certainly, Your
5 Honor. We took Your Honor's order to provide
6 precision and to the best we could we did
7 provide precision in going through the relief
8 that we had requested as well as the plaintiff's
9 Daubert relief that was sought in the Court's
10 rulings. And it's quite clear that in
11 determining what the predetermined thickness
12 limitations mean, the observable change and
13 predetermined thickness, the way that was
14 interpreted by the expert, Dr. Lowman, was that
15 three things, it required a categorical change
16 in color or a specific color or a specific
17 thickness, or color matching from memory.

18 THE COURT: You say that's three
19 different things. He's saying that only one of
20 those three need to be found. Is that correct?
21 That is your understanding of their expert's
22 opinion.

23 MR. IWANICKI: They have different
24 opinions based upon these particular aspects of

1 what they think the observable change is and the
2 predetermined thickness is. And what we did,
3 Your Honor, was to go through the report and
4 particularly identify those paragraphs where
5 their experts provide an opinion as to what they
6 think observable change and predetermined
7 thickness means. And it's one of those three.
8 And the Court says it's none of those three.

9 THE COURT: So, first, I want to
10 make sure we're all on the same page here so we
11 have to move slowly. The claim talks about
12 predetermined thickness; correct?

13 MR. IWANICKI: Yes.

14 THE COURT: Observable change, is
15 that in the claim as well?

16 MR. IWANICKI: It is in the
17 predetermined thickness claims, yes, Your Honor.

18 THE COURT: And so we construed
19 some of this language and your argument is that
20 the defendant's experts have added on additional
21 limitations to what we said these claim
22 limitations require. Correct?

23 MR. IWANICKI: That's correct.

24 And the opinions that are presented in

1 Dr. Lowman's reports.

2 THE COURT: And in particular, one
3 of the things you say the defendants have read
4 into these claims that is not there is a
5 requirement that one of three things be present,
6 and then you listed three. Am I following you?

7 MR. IWANICKI: Yes.

8 THE COURT: Okay. Tell me those
9 three things again that you're saying the
10 defendant's experts saying need to be present.

11 MR. IWANICKI: Okay. A
12 categorical change in color. That's number one.
13 Number two, it's the position that there must be
14 a specific color for a specific thickness. The
15 user must understand that there is a specific
16 color for a specific thickness. And number
17 three, the user must be able to match from
18 memory the initial color to the final color
19 indicating predetermined thickness.

20 THE COURT: So I had thought that
21 the defendant's experts were accused by you of
22 requiring all three of those things in order --
23 that you would have to prove all three of those
24 things in order to prove infringement. Is that

1 your understanding of what the defendant's
2 experts are arguing, or is it not?

3 MR. IWANICKI: I think what the
4 defendant's experts are arguing, certainly they
5 think we can link number two and number three
6 together to a certain extent, the specific color
7 for a specific thickness because essentially
8 what they're saying is first of all, you need to
9 have a specific color for a specific thickness
10 and you need to color match from memory. And
11 because they don't -- they believe that they
12 don't do that or that's not a feature of the
13 accused hydrogels, that they do not infringe the
14 claims.

15 THE COURT: All right. So in
16 other words what it is, you don't think any of
17 those three things are required by the claims;
18 correct?

19 MR. IWANICKI: That's correct,
20 Your Honor. I'm sorry if I misunderstood your
21 question. Yes, absolutely.

22 And, Your Honor, their
23 construction also narrows the predetermined
24 thickness to a single thickness and not a range

1 as the Court had held.

2 THE COURT: Okay.

3 MR. IWANICKI: And so what we did,
4 Your Honor, is we went through and we identified
5 the paragraphs where Dr. Lowman is opining with
6 respect to the particular requirements we just
7 talked about, and I'll give you as an example, a
8 human must match a specific color, and this is
9 on the noninfringement, this is number one on
10 our list, their noninfringement positions. A
11 human must match a specific color or
12 transparency of the hydrogel at a predetermined
13 thickness from memory. That is what Dr. Lowman
14 says is required in order to infringe the
15 claims. And the Court held that is not
16 required. So if they're intending on bringing a
17 position of noninfringement based on that,
18 that's inconsistent with the Court's claim
19 construction.

20 THE COURT: So is it your view
21 that if I agree with you that there is -- there
22 are no noninfringement or invalidity opinions
23 left that their experts can present.

24 MR. IWANICKI: I think that's

1 correct, Your Honor, because Dr. Lowman did not
2 provide an alternative to something other than
3 his own understanding of what the claims mean
4 when opining on noninfringement or on the many
5 different invalidity positions.

6 And it's quite clear, Your Honor,
7 that they're relying on these inconsistent
8 opinions because what you can essentially see is
9 what we have done is we have taken the actual
10 headings from Dr. Lowman's report and, for
11 example, we'll go to one of them here, it's at
12 page seven, opinion that the predetermined
13 thickness claims are invalid for lack of
14 enablement and lack of written description
15 because there is no disclosure in the
16 specification teaching how any of the disclosed
17 visualization agents could cause an categorical
18 observable change in color to indicate a
19 predetermined thickness of hydrogel. That is
20 the opinion that's in his expert report, one of
21 the opinions on indefiniteness.

22 Another one, the predetermined
23 thickness claims are invalid for lack of
24 enablement because a human cannot perform the

1 claimed color or transparency memory match. So
2 they're saying that's a requirement of the
3 claim, and because the specification doesn't
4 teach one of ordinary skill in the art how to do
5 that, it lacks enablement. And so on --

6 THE COURT: I think I understand.
7 Let me hear from the defendant now.

8 MR. PIVOVAR: Your Honor, I wanted
9 to touch on this categorical change thing first
10 because I think that the plaintiffs are grossly
11 mischaracterizing Dr. Lowman's position. So
12 there is two aspects to this. You have
13 infringement where you look at the whole scope
14 of the claim. And what the Court faulted
15 Dr. Lowman and Dr. Flombaum for is using wording
16 that could potentially be used to narrow that.

17 So the ranges that they're saying
18 that our experts are opining there is full scope
19 of this claim and maybe there is like some
20 possibility that they narrowed it down. But
21 there is no dispute at all that these particular
22 features of requiring categorical change or the
23 other things fall within the scope of the claim.

24 And when you look at exactly what

1 is at page seven of the submission last night,
2 or yesterday, you'll see that -- you'd see, Your
3 Honor, they say oh, Dr. Lowman, he relies on an
4 understanding of predetermined thickness claims
5 that requires a categorical change. But let's
6 look at the quotations they have for his expert
7 report. The quotation doesn't say that. It
8 says they include a categorical change. So
9 there is a difference between --

10 THE COURT: Are you saying you
11 only want to put your expert on to say that hey,
12 we would also infringe if we had a categorical
13 change. We don't have categorical change, but
14 I'm not opining that we don't infringe because
15 we lack a categorical change?

16 MR. PIVOVAR: That's essentially
17 right because the full scope of the claim meets
18 a categorical change requirement and there is no
19 teaching of that part of the claim. But our
20 argument about noninfringement is not related to
21 there not being a categorical change.

22 THE COURT: You agree that no
23 categorical change is required in order to
24 practice these claims?

1 MR. PIVOVAR: Yes. It's not
2 required. So it's not necessary.

3 THE COURT: If you have a
4 categorical change and everything else, you
5 infringe.

6 MR. PIVOVAR: You would infringe.
7 That's the difference, we say this is one
8 embodiment that you can have within the full
9 scope of the claim that isn't enabled and there
10 is no written description for so it's invalid,
11 but that doesn't mean if you don't practice that
12 small part you don't necessarily infringe.

13 THE COURT: So it's an invalidity
14 opinion, it's not a noninfringement opinion?

15 MR. PIVOVAR: Exactly. That's why
16 it's says includes, not exclusive --

17 THE COURT: Do you propose to
18 offer your experts to talk at all about
19 categorical change in the context of
20 noninfringement?

21 MR. PIVOVAR: No. And we have to
22 understand exactly, I think if we could put this
23 into a little bit of context, we can explain why
24 it is -- can you please, go all the way up to

1 slide one. Has Your Honor viewed any of these
2 videos of how this product works? I don't want
3 to go on a big detour, but it's really important
4 --

5 THE COURT: We're not going to go
6 on a big detour whether I have looked at it or
7 not, but you can go on a short detour.

8 MR. PIVOVAR: Thank you, Your
9 Honor.

10 When these materials are applied,
11 what you're going to see here, hopefully, is
12 that when it comes out of the sprayer, it's
13 going to be green. You're going to see it. He
14 sprays it, it's green. It's a dark green color
15 and then this video shows putting down layers
16 where it's a nice even green color at the first
17 layer. A nice even green color at the second
18 layer. And according to their experts, that's
19 too thin. That's not the one millimeter
20 predetermined thickness. So he puts down more.
21 Still a nice even green layer. Here is some
22 more, nice even green layer. You can see it's a
23 controlled spray that's taking a lot of time to
24 form a seal. Then he goes again. Then he goes

1 again.

2 So that's what the product looks
3 like. And our arguments for noninfringement are
4 all responsive to what they say those first two
5 green colors, those are below the one to two
6 millimeter predetermined thickness. It's that
7 third layer that falls within that one to two
8 millimeters.

9 So what we say is, when you look
10 at that, can you actually see and discriminate
11 in real time whether there is a color change at
12 that point and can you see a difference, because
13 it's not just that there is an observable
14 change, it's not just that there is an
15 observable change that's happening at all
16 thicknesses, what this is as Dr. Mays, he says
17 it's applied several times. With each
18 application the color of the green mixture turns
19 a deeper green color. So if the observable
20 change is getting darker green, that's happening
21 at all thicknesses.

22 And then he says also the
23 visibility of the segmented line becomes reduced
24 or obscured with all applications. So again,

1 the obscurity is happening at all thicknesses.
2 So the observable change cannot be a generic
3 it's getting darker green or it's getting more
4 cloudier. That's because that's what the claim
5 construction require. It says you have to be
6 looking at a change in color or transparency of
7 the hydrogel and it has to be correlated with a
8 thickness of hydrogel such that the change can
9 be used to indicate the crosslinked so you have
10 your predetermined thickness.

11 So our experts looked at this,
12 they looked at their allegations, all of their
13 opinions are related to what they have accused
14 which is a one to two millimeter predetermined
15 thickness range.

16 THE COURT: All right. So in your
17 view, the darker green is not enough to be
18 infringement?

19 MR. PIVOVAR: So you have to
20 connect it all up, if you let me go through a
21 couple of slides.

22 THE COURT: I'll give you a
23 couple. You made these arguments for months,
24 and I'm still having trouble following them.

1 MR. PIVOVAR: Right. Go to the
2 next slide. So here, this is a thickness and
3 color. Go to the next slide. So you have your
4 one to two millimeter predetermined thickness.
5 Go to the next slide. This is the observable
6 change in the predetermined thickness range, so
7 it's getting darker all through here, but you
8 need to have the changes that are happening
9 here. But there are observable changes
10 happening below and above.

11 So the point is if you're going to
12 say that you're going to find an observable
13 change that's in the one to two millimeter
14 range, it has to be this particular range, not
15 up here that's outside the predetermined
16 thickness and not down here that is outside the
17 predetermined thickness.

18 So what we talk about our experts
19 say if you're doing this and you're going to
20 actually apply the claim, you have to be able to
21 match this particular range of colors across
22 that thickness in multiple applications. And I
23 can see that, I don't want to keep on going with
24 this. That's our position. I just want to make

1 sure you understood it.

2 THE COURT: Well, I'm not sure.
3 So can it be a darkening shade of green or can
4 it not in your expert's opinion?

5 MR. PIVOVAR: It can be the
6 darkening shades of green that occur within the
7 predetermined thickness. So the answer --

8 THE COURT: What if they're
9 occurring in other thicknesses as well?

10 MR. PIVOVAR: So when you say
11 they're occurring, do you mean the specific
12 shades of green?

13 THE COURT: Yes.

14 MR. PIVOVAR: So this is one
15 application. So I just have one, we have what
16 happens there. If you go to the next slide. Go
17 to the next slide. Go to the next slide.
18 Right.

19 So what we have here is there is a
20 correlation requirement. So in this, you have a
21 changing shade of green that's happening in a
22 certain range, you get thicker, if it doesn't
23 happen the same way, if you see these colors
24 that you're looking for and they occur above two

1 millimeters, then there is no correlation. And
2 if I was looking for these colors when I applied
3 this, I wouldn't know where to stop. I would
4 stop somewhere up here which is not in the
5 predetermined thickness range. And if it's down
6 here it's too thin. That's how we looked at
7 this is that there is a subset of a shade of
8 greens that falls within the one to two
9 millimeter range, and then that's what needs to
10 be correlated and that's what you need to look
11 for.

12 THE COURT: Do you understand what
13 just said to be the -- I got it here as the
14 fourth argument that the plaintiffs are saying
15 you're making that is inconsistent with claim
16 construction, that is whether you narrowed the
17 predetermined range to a single thickness?

18 MR. PIVOVAR: No, because the
19 predetermined thickness range for our experts is
20 one to two millimeters, so we're not narrowing
21 it to any single thing, we're saying it's this
22 range.

23 THE COURT: I'm just asking if you
24 understand what you're arguing now to line up

1 with the fourth argument that the plaintiffs
2 made?

3 MR. PIVOVAR: No.

4 THE COURT: So it's a whole
5 separate issue.

6 MR. PIVOVAR: Can you go to the
7 next slide, maybe. So what our expert said was
8 such a color change indicates a predetermined
9 thickness of one to two millimeters. We are
10 talking about the range and all the colors
11 within that range, so we haven't narrowed it,
12 for our noninfringement argument we haven't
13 narrowed it to a single range.

14 THE COURT: Let's come back to the
15 plaintiff's argument. They're saying your
16 expert is requiring a categorical change in
17 color in order to show infringement. You've
18 already told me we're not going to offer a
19 noninfringement to say that we don't have a
20 categorical change in color. Is that correct?

21 MR. PIVOVAR: That's correct.

22 THE COURT: They say that your
23 expert is requiring a specific color for a
24 specific thickness and the user must understand

1 that. Are you going to offer that as a basis
2 for noninfringement?

3 MR. PIVOVAR: So what we are
4 offering, if you go back to the previous slide.

5 THE COURT: Can you first try to
6 answer yes or no, are you going to offer that
7 opinion or no?

8 MR. PIVOVAR: So the answer -- I'm
9 sorry, can you just -- I got hung up on a just a
10 little word of that how it was phrased.

11 THE COURT: I was just
12 paraphrasing. You heard the argument, I think
13 you're pretty familiar with it at this point.
14 They say that your expert is reading in a
15 requirement of a specific color for a specific
16 thickness and that the user must understand it.
17 Is that going to be any part of your
18 noninfringement opinion?

19 MR. PIVOVAR: No. It's going to
20 be that range.

21 THE COURT: And then they also say
22 that your expert is going to say that the user
23 must match from memory how the initial color
24 changes to a final color. Is that part of your

1 noninfringement case?

2 MR. PIVOVAR: Part of our
3 noninfringement case is that for the claims to
4 have an indication of a predetermined thickness,
5 you have to know that you're in the range when
6 you have the observable change. So it's not a
7 match to a specific color, it's a match against
8 the range of colors that you can see against one
9 to two millimeters.

10 THE COURT: So yes, that is part
11 of what you're going to argue is missing from
12 your product and therefore is a basis for
13 finding of noninfringement?

14 MR. PIVOVAR: Not a singular
15 color, it's the range of colors that could be
16 between one and two millimeters if you could
17 show a correlation.

18 THE COURT: Is the user going to
19 have to match from memory?

20 MR. PIVOVAR: The user should know
21 prior to application what the visual change will
22 be once the predetermined thickness is matched.

23 THE COURT: And you want to argue
24 at this trial that if the user doesn't know that

1 with respect to your product, then you do not
2 infringe?

3 MR. PIVOVAR: That's right, Your
4 Honor.

5 THE COURT: So this third one, you
6 are hoping to offer these opinions; correct?

7 MR. PIVOVAR: That's right.

8 THE COURT: Now, what about for
9 invalidity, let's go through all three of them
10 again. For invalidity you do want to argue that
11 the patent is invalid somehow on one or more
12 bases because of something related to this
13 categorical change in color requirement. Right?

14 MR. PIVOVAR: That's right.

15 THE COURT: And for which opinions
16 is that going to be relevant?

17 MR. PIVOVAR: It's relevant to
18 lack of enablement and I believe there is a lack
19 -- so it's the 112 issues, there is a lack of
20 written description for.

21 THE COURT: Okay. How about this
22 opinion about the specific color for a specific
23 thickness that the user must understand, is that
24 part of your invalidity case?

1 MR. PIVOVAR: I believe that that
2 would be part of the full scope of the claims,
3 but it's not strictly something that's required.

4 THE COURT: It's not required?

5 MR. PIVOVAR: No, for our
6 opinions. So what you just mentioned is one of
7 the full scope of the embodiments, but our
8 arguments are a little bit broader.

9 THE COURT: So is it fair to say
10 for this, whatever was articulated as the second
11 thing that the plaintiffs say that the
12 defendants want to do is inconsistent with the
13 claim construction is not part of this case,
14 defendants aren't offering that as basis for
15 noninfringement and it's not being offered as a
16 basis for invalidity?

17 MR. PIVOVAR: We don't believe so,
18 Your Honor.

19 THE COURT: You don't believe
20 you're offering it or you don't believe you are
21 offering it?

22 MR. PIVOVAR: And I apologize if I
23 didn't --

24 THE COURT: Let me put it this

1 way. If they articulated a second addition to
2 the claims that they say your experts are
3 reading in that isn't there, if I understood you
4 correctly, you're saying that's not part of our
5 noninfringement and now you're saying it's not
6 part of our invalidity case. So I take it you
7 don't object to me entering an order saying your
8 experts are not going to opine and you're not
9 going to offer evidence with respect to what
10 they have identified as the second thing that
11 you have added to the claim.

12 MR. PIVOVAR: I just want to make
13 sure, the second thing we have added to the
14 claims. It's the specific color at a specific
15 thickness?

16 MR. ALTHERR: Yes, Your Honor.
17 The second one, the way we read Dr. Lowman's
18 report is that he's requiring the user apply a
19 standard of a specific thickness or a specific
20 -- a specific color to achieve a specific
21 thickness in order to meet the observable change
22 in the predetermined thickness limitation of the
23 claim, not a range of thicknesses, not a range
24 of colors, because that's not in his expert

1 report.

2 THE COURT: All right.

3 MR. PIVOVAR: So listening to that
4 again, it's a question of what is required by
5 the claim and what is allowed by the claim. And
6 that embodiment that they just described is
7 actually allowed and described explicitly in the
8 specification, where it says the user applies a
9 test application, looks at the color and then in
10 use applies it to that color. That's one part
11 of it.

12 The second part is the
13 predetermined thickness construction says a
14 singular or a range of thicknesses. So one
15 embodiment of all of that is you have a single
16 thickness and you have this apply a test
17 application and then you stop when you see the
18 color. When you meet those two up, that falls
19 within the scope of the claim. From an
20 inclusion standpoint, yes. From a requirement
21 of the claims standpoint, no, Your Honor.

22 THE COURT: So as I understand
23 that, it's not going to be part of your
24 noninfringement case, but it is part of your 112

1 invalidity case.

2 MR. PIVOVAR: Exactly. Thank you,
3 Your Honor.

4 THE COURT: And then this third
5 one, though, about matching from memory the
6 initial color to the final color, that is part
7 of your noninfringement case, and I think also
8 part of your invalidity case. Do I have that
9 right?

10 MR. PIVOVAR: So it would
11 follow -- for the invalidity it would follow the
12 example I just talked about in the specification
13 where is said the user does a test and the user
14 applies the material until the test color is
15 achieved. That's the part for invalidity.

16 For noninfringement it really is
17 just with respect to what the R&R order said
18 about the user must know prior to application
19 what will be the visual change caused by the
20 visualization agent once the predetermined
21 thickness is reached.

22 So the claims require that it has
23 to be used as an indication of a predetermined
24 thickness. Obviously if you don't know what I'm

1 looking for, it can't indicate to me that I'm
2 there.

3 THE COURT: That's not obvious to
4 me. Don't we see things all the time that you
5 weren't aware before you saw them that what they
6 were going to mean to us when we saw them?

7 MR. PIVOVAR: I think that is true
8 -- so, also, if it said a relative thickness and
9 we want to say it's getting thicker, you can see
10 that. You don't have to do multiple
11 applications. But I don't know how it can be
12 used -- if you're going to have a visually
13 observable change which is a change in color or
14 transparency to hydrogel in the context of the
15 accused products where it is continuously
16 changing both below and above the predetermined
17 thickness range, that you could use either of
18 those metrics to tell you when you're within the
19 range. If you don't know if you're looking at a
20 visual change that's below one to two or above
21 two, you have to be able to know that you're
22 actually in that range. And the only way you
23 can know that is if you knew what you were
24 looking for before. Which I think is why Judge

1 Burke came to this conclusion about what the
2 claim means in this R&R order.

3 THE COURT: All right. Did you
4 understand there to be anything further that the
5 plaintiffs are accusing you of trying to make
6 part of your noninfringement or invalidity case
7 that is inconsistent in their view with the
8 claim construction, other than these at least
9 three issues that we have sort of just talked
10 through.

11 MR. PIVOVAR: The paragraphs that
12 I identified in the submission for you yesterday
13 go way beyond these issues, Your Honor, way
14 beyond. We have issues, if you recall, there
15 were three different aspects to the claim
16 construction that Mr. Iwanicki raised, and as
17 part of what Judge Burke said in his order, is
18 he said there is these three requirements, and
19 in light of this, I don't find that how
20 Dr. Lowman, our expert, described these three
21 things as inconsistent with the Court's
22 construction.

23 So what it is, there is a
24 causation requirement, the visualization agent

1 has to cause the visually observable change.
2 They're looking now in all the paragraphs they
3 identified to you to throw all of those out.
4 Even experiments that Dr. Lowman performed that
5 have nothing to do with claim construction, Your
6 Honor, they're looking to throw out.

7 If we look -- what I have done
8 here is I have taken and highlighted all of the
9 places that the plaintiffs are asking to be
10 stricken. It's just essentially everything
11 about our invalidity defenses. And if you look
12 at Dr. Lowman, he provided a set of experiments.
13 He said I made hydrogels using these products
14 because I wanted to show that it's the air
15 bubbles that are causing the visual changes that
16 you're looking at, not the dye.

17 So this is only a dispute about
18 what is the visualization agent. It doesn't
19 have anything to do with the predetermined
20 thickness. What you see, Your Honor, is they,
21 the plaintiffs, want to strike that opinion.
22 They want to strike these experiments that we
23 rely on. And they just have page after page,
24 and so much of this is not even directed to any

1 of these predetermined thickness issues, they're
2 directed to other aspects of the claims.

3 So I understand from their request
4 is they're essentially asking you to throw out
5 every single aspect of what our experts have
6 done on any predetermined thickness claim, not
7 just with respect to the issues that we raised
8 here today.

9 THE COURT: Let me bring them back
10 here. Thank you.

11 Mr. Iwanicki, if you could come
12 back. First of all, I didn't even think we had
13 come to the visualization agent yet. Are you
14 asking me for some relief with respect to their
15 opinions on visualization agent?

16 MR. IWANICKI: Your Honor, the
17 three things are linked together. You can't
18 have an observable change without a
19 visualization agent and the observable change is
20 used to indicate a predetermined thickness. So
21 they are all tied together to a certain extent.

22 But I did want to look
23 specifically with -- Your Honor, this issue of
24 whether something is inside the scope of the

1 claim within the scope of the claim for purposes
2 of enablement or written description or whether
3 it's required by the claim is a red herring. I
4 mean, you can have -- you can get a patent on an
5 automobile comprising a steering wheel, chassis,
6 four wheels and an engine and you can enable
7 that and you can provide a written description
8 for that. They come along and say wait a
9 second, a Maserati is within the scope of the
10 claim. There is nothing in there with respect
11 to a description of a Maserati. We don't have
12 to enable a Maserati, you enable what the claim
13 is and look at whether or not it provides an
14 adequate written description that teaches one of
15 ordinary skill in the art how to practice that
16 claim.

17 THE COURT: That might be a fine
18 argument on the merits, but let's pick up I
19 guess where they left off.

20 MR. IWANICKI: Sure, Your Honor.

21 THE COURT: On infringement, they
22 tell me if I understand them correctly, they're
23 not offering either of the first two
24 requirements that you identified as a basis for

1 noninfringement. That seems like a pretty clear
2 representation. It seems to me, therefore,
3 there is nothing to strike with respect to their
4 offered opinions on noninfringement with respect
5 to those first two purported additional
6 limitations. Do you agree with that?

7 MR. IWANICKI: Yes, Your Honor, if
8 their representation is that they will not
9 bring -- if they will not bring opinions whether
10 it's based on those, but based on the first one,
11 the categorical change theory and the specific
12 thickness or a specific color for a specific
13 thickness, Your Honor, I would agree with you
14 that if that's their representation, then we
15 won't expect to see the portions of the expert
16 report being repeated by Dr. Lowman up on the
17 stand with respect to those opinions.

18 THE COURT: With respect to those
19 opinions for purposes of noninfringement?

20 MR. IWANICKI: For purposes of
21 noninfringement, yes.

22 THE COURT: Now, the third one
23 they say they are, at least as I understand it,
24 reserving the right to offer it as a basis for

1 noninfringement about the matching from memory.

2 MR. IWANICKI: Okay.

3 THE COURT: So I guess respond to
4 that.

5 MR. IWANICKI: Sure. The color
6 matching from memory, Your Honor, was the
7 creation of Dr. Flombaum. And he's the one who
8 is providing the opinion on which Dr. Lowman
9 provides his opinion that there must be a color
10 matching from memory. In other words, you have
11 to have a specific color in mind and you have to
12 observe when that specific color is reached.

13 From what I understand on the
14 motion to strike, Dr. Flombaum's report is
15 mostly stricken and he will not be able to
16 provide an opinion with respect to color
17 matching from memory. With that in mind,
18 Dr. Lowman isn't going to be able to provide an
19 opinion with respect to color matching from
20 memory because he relies on what Dr. Flombaum
21 has said.

22 So it gets to the issue of do they
23 have anything left after Dr. Flombaum's --

24 THE COURT: That's a whole

1 separate issue it seems to me, but if they do
2 have something left, why should I find that it
3 is adding a limitation to the claims that aren't
4 really there to say look, you have to have some
5 understanding of what you're looking for in
6 order to know what you're seeing.

7 MR. IWANICKI: I think, Your
8 Honor, that to a certain extent, yes, you need
9 to be able to understand whether or not you have
10 a -- you reached a predetermined thickness based
11 upon an observable change. What the Court has
12 said with respect to that is the Court recently
13 explained in resolving the parties' summary
14 judgment motion regarding the predetermined
15 thickness claims, a reasonable juror could agree
16 with Dr. Mays' application of relative
17 constructions and view a change in color of the
18 hydrogel observable to the human eye as being
19 satisfied by a hydrogel that goes from a green
20 tint with gaps to an even green color.

21 And so to a certain extent when
22 you're applying this and looking at it when
23 applying it, you can go from a green tint with
24 gaps to an even green color and that is the

1 observable change that indicates the
2 predetermined thickness. So you don't
3 necessarily need to have this colored matching
4 from memory requirement in the claims. And if
5 it is a requirement of the claims, they're
6 saying that the user has to understand that
7 that's my starting point and that's my end
8 point, the Court did not require that at all of
9 the claims and that's -- that position is
10 inconsistent with what the Court said the claims
11 mean.

12 Then the Court continued: It does
13 not jive with Dr. Lowman's requirement for the
14 matching of a specific color or a transparency
15 to another color or transparency because
16 Dr. Mays' articulation does not necessarily
17 describe a change to one specific shade of
18 green.

19 The Court concludes that because
20 expert testimony is inconsistent with the
21 Court's claim construction it's unreliable. The
22 Court concludes that Dr. Flombaum's opinions
23 narrow the predetermined thickness requirements
24 beyond the Court's construction and they are

1 stricken.

2 THE COURT: So to the extent their
3 expert wants to opine that you need to have some
4 understanding of what you're looking for, which
5 includes by implication some understanding
6 before you even start what it is you're going to
7 be looking for to see if you're within the
8 scopes of the claims as you start practicing,
9 you say that that is something that's not in the
10 claims or that is something that's in the
11 claims?

12 MR. IWANICKI: Yes, Your Honor,
13 the visualization agent causes an observable
14 change. You have to see what it was before and
15 what it is after and that indicates a
16 predetermined thickness. That's what we have
17 been saying all along.

18 What they're saying is that no,
19 it's even narrower than that. And besides,
20 Dr. Lowman doesn't have such an opinion in his
21 report. All of his opinions are based on the
22 three narrowed claim constructions that we talk
23 about in order to avoid infringement.

24 THE COURT: What about this fourth

1 thing that you think you identified about the
2 range versus the single point, where are we on
3 that? Do you think they're trying to offer that
4 based on what you heard?

5 MR. IWANICKI: I'm not sure I
6 understand what they're offering with respect to
7 the range because certainly the Court concluded
8 that it doesn't have to be a specific thickness,
9 it could be a range of thicknesses where you
10 reached the predetermined thickness.

11 THE COURT: Okay. And so that's
12 infringement. On invalidity, if I understand
13 correctly, they are going to argue that all
14 three of these are pertinent to invalidity
15 analysis at least for 112 purposes. Your view
16 is that that's not a meritorious defense, but
17 are you also arguing that it's somehow
18 inconsistent with the Court's claim
19 construction?

20 MR. IWANICKI: Yes.

21 THE COURT: Help me to understand
22 that.

23 MR. IWANICKI: Because the Court
24 did not provide an opinion that says that

1 categorical change is inside the scope of the
2 claim, it did not provide an opinion that color
3 matching from memory is inside the scope of the
4 claim.

5 THE COURT: Did we provide an
6 opinion somewhere that those things are not
7 within the scope of the claim?

8 MR. IWANICKI: Yes, I think in
9 determining what the claim meant, that's what
10 they argued it meant, and the Court said no, no,
11 no, those required unnecessary limitation so I'm
12 not going to require those to be in the scope of
13 the claim.

14 THE COURT: I don't think I
15 followed that. In general what I thought we
16 were arguing is that they were trying to add
17 limitations that would narrow the scope of your
18 claims to a narrower -- to make them narrower
19 than they really are. Isn't that part of what
20 you're arguing?

21 MR. IWANICKI: Yes.

22 THE COURT: If I agree with you
23 that some of what they were trying to do perhaps
24 would narrow your claim scope, to narrow then

1 what you really possess, how is that finding in
2 any way a finding that some of the embodiment
3 that they say are within the scope of your
4 claims for invalidity purposes are not actually
5 part of the scope of your claims?

6 MR. IWANICKI: I think it goes to
7 the issue becomes one of whether or not they're
8 setting up these species if you will, and
9 they're saying that you have to enable these
10 species. And what I'm saying by species are
11 those narrower limitations of the claim which
12 the Court said we're not allowed. So the
13 position that they have is the claim is invalid
14 because it doesn't teach those particular
15 species, but the claim is much broader, we don't
16 have to teach these species, we don't have to
17 enable those species.

18 THE COURT: Why isn't that an
19 argument about what I should tell the jury on
20 enablement as opposed to whether or not the
21 expert is doing something inconsistent with the
22 claim construction?

23 MR. IWANICKI: Because they do not
24 have an alternate opinion. They do not have

1 Dr. Lowman's words saying otherwise.

2 THE COURT: All right. Thank you.
3 Anything further you want to say
4 on this?

5 MR. PIVOVAR: If I could briefly,
6 Your Honor.

7 THE COURT: Yes.

8 MR. PIVOVAR: I just wanted to
9 come back to one thing about the Dr. Flombaum
10 and Dr. Lowman about how they have interpreted
11 the claims and whether they have narrowed it,
12 because they keep on saying it's been narrowed
13 to a single color and single thickness. If you
14 look at what we submitted, this was in our
15 objections, you can see how Dr. Flombaum
16 explained what Dr. Lowman explained to him about
17 what the scope of the claim is. He's talking
18 about it's the range of colors that indicate
19 that the appropriate thickness has been
20 achieved. He's saying the accusation of
21 infringement, he's saying it's the range of
22 colors, range of colors and that range of
23 thickness.

24 You can see when they're applying

1 this, the words have been distorted as part of
2 what they're saying and respectfully what Judge
3 Burke opined, they are not limiting the claim
4 for noninfringement in the way that they're
5 saying, they're taking that all into account.

6 The second point I would like to
7 make, Your Honor, is that nothing -- they
8 haven't really said anything about what their
9 actual infringement opinions are with respect to
10 the observable change they're pointing to in the
11 accused products. And it's just a cornucopia of
12 different things. They say well, it's the even
13 deep green color, so we respond to that and say
14 well, it can't be just any deep green color, it
15 has to be the ones that are in the predetermined
16 thickness range.

17 Then they talk about the even
18 green color and Mr. Iwanicki pointed out that we
19 have this opinion and Dr. Mays said this. In
20 response to their summary judgment brief we had
21 counter arguments to noninfringement that didn't
22 necessarily require addressing every argument
23 they made, but if you look at what he said about
24 the even green color, you can see what

1 Dr. Lowman says in response. He's got a direct
2 response to their opinion that the even green
3 color is the observable change that indicates a
4 predetermined thickness. And he goes directly
5 to that. That has nothing do with any of these
6 color matching or memory matching. He's just
7 saying you don't have a correlation in the
8 plaintiff's argument for this even green color.
9 He says he can't correlate an even green color
10 because you saw the video, it's an even green
11 color at all thicknesses.

12 And they're asking you to strike
13 our exactly responsive noninfringement arguments
14 that have nothing to do with any of this memory
15 match. It doesn't have anything to do with the
16 single color at a single thickness issue. This
17 is what they're asking for now. So I just want
18 to point that particular piece out.

19 And then the rest of the issues
20 that we have, Your Honor, they are all
21 responsive. There is a range of thicknesses, a
22 range of colors, and we think that they should
23 be allowed to come and actually present their
24 opinions at trial.

1 If Your Honor has no further
2 questions.

3 THE COURT: No. So you know, I'm
4 trying my best to help you all have clarity
5 about what's going to happen at this trial, but
6 clearly there are limits to how much we can
7 figure out before trial. I will say this with
8 respect to what's already been argued -- you can
9 have a seat.

10 MR. PIVOVAR: Thank you.

11 THE COURT: First as I think I
12 made clear in my order and as I don't think is
13 disputed, if I'm persuaded that a particular
14 opinion or evidence is inconsistent with the
15 Court's claim construction, it will not come in,
16 or it will be stricken.

17 If on the other hand I'm persuaded
18 that certain evidence or opinions are simply
19 disputes over how the claim construction is
20 applied, either for purposes of infringement or
21 invalidity, that's part of what the trial is
22 about and that evidence or opinion will come in.

23 With respect to the specifics that
24 have been argued, as I understand it there were

1 four particular identifications where the
2 plaintiff accuses the defendant of trying to
3 introduce evidence and opinion that is
4 inconsistent with the Court's claim
5 construction, and accuses the defendant of
6 wanting to do so with respect to both
7 noninfringement and invalidity.

8 Turning first to infringement,
9 what the plaintiff identified as one and two I
10 now understand are not being offered as a basis
11 for noninfringement, and I hereby order that
12 they will not be offered as a basis for
13 noninfringement.

14 With respect to number three,
15 which I understand, and number four, which I
16 understand the defendant is at least reserving
17 the right to present evidence and argument as a
18 base for noninfringement on the points three and
19 four, I am going to have to make decisions at
20 trial about those. It does seem to me that some
21 of what the defendant is proposing to argue as a
22 basis for noninfringement would be not
23 inconsistent with the Court's claim
24 construction. I'm not prepared to say that they

1 can't do any of what they propose to do with
2 respect to three and four as a basis for
3 noninfringement. So we're just going to have to
4 see. Obviously we have a procedure, at least
5 when it comes to the direct testimony that the
6 defendant will seek to elicit from its expert
7 that they're going to have to identify the
8 exhibits in advance that they intend to use,
9 they're going to have to identify the
10 demonstratives that they intend to use in
11 advance. The plaintiff can raise objections to
12 those. If and when the defense experts get on
13 the stand, the plaintiffs have a right to object
14 to specific questions as seeking opinions that
15 are beyond the scope of what was previously
16 disclosed by the expert. And everyone retains
17 their right to argue that particular evidence in
18 argument is inconsistent with the Court's claim
19 construction ruling.

20 Beyond that on one through four
21 for infringement, I can't do any better than
22 that today.

23 With respect to invalidity, I am
24 not ruling out any of what the defendants

1 proposed to do on points one through four, which
2 is all we have talked about to this point in the
3 proceeding today. I am not persuaded at this
4 point that any of what the defendants are
5 proposing to do with respect to those points one
6 through four on invalidity is consistent with
7 the Court's claim construction.

8 A dispute about what is inside the
9 scope of the claims or outside the scope of the
10 claims may come up in the context of what I
11 should instruct the jury as to enablement or
12 other 112 defenses. And again, all parties have
13 the right to object to particular expert
14 testimony as being outside the scope of what was
15 previously disclosed. But on this narrow
16 question of are the defendants trying to do
17 something inconsistent with the court's claim
18 construction, I'm not persuaded at this point
19 they are. And the plaintiff can take another
20 shot in the context of the trial if they think I
21 have gotten that wrong.

22 Let's move on at a greater pace
23 with plaintiffs on to the other things that you
24 think are inconsistent with the claim

1 construction.

2 MR. IWANICKI: Your Honor, just
3 one question.

4 THE COURT: Come up to the podium.

5 MR. IWANICKI: Sorry.

6 In view of your order, is
7 Dr. Flombaum going to be allowed to testify on
8 the color matching from memory?

9 THE COURT: You all are going to
10 have to work on that. I have done the best I
11 can.

12 MR. IWANICKI: Thank you, sir.

13 THE COURT: But stay with us if
14 you want to argue that there are other issues.
15 I think you had claim 10 indefiniteness and
16 visualization, so if you think that there is
17 something that the defendants are seeking to do
18 that's inconsistent with the Court's claim
19 construction on either of those points, let's
20 talk about that.

21 MR. IWANICKI: Yes, Your Honor. I
22 think that the position with respect to claim 10
23 and its indefiniteness is based on Dr. Lowman's
24 opinion that in my opinion the separate

1 application of two hydrogel formed materials to
2 the tissue would be the only definite way to
3 interpret the claim language.

4 This claim requires a couple of
5 things. It requires mixing reactive precursor
6 species such that the functional groups
7 crosslink after contact with the tissue, and
8 then the hydrogel is formed within five seconds
9 after contact with tissue.

10 The position that they're
11 advancing with respect to indefiniteness is that
12 the only interpretation that makes sense in that
13 claim is if both components are applied directly
14 to the tissue because that's when crosslinking
15 begins.

16 Now the Court found that that was
17 not an appropriate interpretation of the claim.
18 The Court held that there could be some -- the
19 functional groups of the reactive precursor
20 species are mixed in such a way that some but
21 not necessarily all crosslinking occurs after
22 the composition makes contact with the tissue.
23 So it specifically excluded Dr. Lowman's
24 understanding of the claim on which his

1 indefiniteness position is based. And it also
2 said that the way you can tell when a hydrogel
3 is formed within five seconds after contact with
4 the substrate is that hydrogel materials form
5 visible and solid aggregate. And Dr. Lowman
6 testified, on which Judge Burke relied, is the
7 way you determine that is by visual inspection
8 by looking at it.

9 So our position, Your Honor, is
10 the way the Court construed the claim they don't
11 have an indefiniteness opinion or indefiniteness
12 opinion with respect to claim 10 because that's
13 based on their understanding of the two
14 precursors being applied simultaneously or one
15 after the other to the tissue directly. Since
16 the Court was able to construe the claim, we
17 don't think that they have an indefiniteness
18 position. And to the extent they want to bring
19 that, that's inconsistent with the Court's claim
20 construction.

21 THE COURT: Thank you. Let me
22 hear the response to that.

23 MR. PIVOVAR: So Your Honor, the
24 indefiniteness positions were spelled out.

1 There was a mixing aspect and then there was
2 what does it mean to form the hydrogel within
3 five seconds. And the reason for that, you have
4 a five second requirement in claim 10, and so
5 what you need is when do I start and when do I
6 stop, and what's the time for that.

7 So Dr. Lowman looked at the
8 claims, he said well, if you're going to do
9 this, you have to look at it and you have to
10 know when are you mixing and when are you
11 starting the clock. And the Court has resolved
12 that, yes. But we have a pending objection on
13 what does it mean on the stop.

14 So from the perspective of what
15 the Court said about what mixing is required and
16 what the start point is, the Court just said it
17 starts when you hit the tissue. Right? The
18 question is, when does that end. So when it
19 comes to the indefiniteness issue, that's what's
20 still pending from our perspective, not the
21 mixing, the Court resolved that. We obviously
22 disagree, we'll appeal it and all that stuff,
23 but for the purposes of this, we are not going
24 to say there is an indefiniteness issue with the

1 mixing, it's more about how long does it take
2 and what is the hydrogel formation issue, which
3 you had before.

4 THE COURT: Right. That I think
5 is perhaps the most recently briefed set of
6 objections, the ones that relate to claim 10
7 summary judgment; correct?

8 MR. PIVOVAR: That's right, Your
9 Honor.

10 THE COURT: And that's where Judge
11 Burke recommended certain findings of
12 infringement. And you say if I were to agree
13 with that, then the claim is indefinite; is that
14 right?

15 MR. PIVOVAR: What we say is --
16 can you put the slides up really quickly?

17 THE COURT: Let me put it this way
18 and maybe we'll move into that argument next.
19 But if I agree with Judge Burke and adopt that
20 R&R over your objections, do you still have an
21 indefiniteness opinion that you think you can
22 present at trial?

23 MR. PIVOVAR: So the answer to
24 that is I believe we would, but I think that

1 some additional clarity would maybe resolve it
2 and be helpful for the parties just with respect
3 to what is happening, because there are a lot of
4 technical issues, there are a lot of scientific
5 things and there are some things there that are
6 inconsistent as a technical matter to say that
7 you have a fully cured hydrogel that's a visible
8 solid aggregate, but then pointing to evidence
9 of times that are related to a set time or a gel
10 time, because those are all different things.

11 THE COURT: It seems to me that
12 perhaps I have to first decide if I'm adopting
13 his R&R on infringement before I can maybe reach
14 this indefiniteness question.

15 MR. PIVOVAR: That's what I was
16 going to say. If that's still pending,
17 depending on how that gets resolved, it will
18 depend on whether we have this bookend, but
19 we'll agree that the mixing part we didn't
20 object to that part. We understand what that
21 is. It's more on this claim 10 issue, which I
22 think you prioritize that one down.

23 THE COURT: I will come back to
24 that.

1 MR. PIVOVAR: We got pretty
2 pictures.

3 THE COURT: I see that. All
4 right. You agree that some of these issues are
5 also tied up in the pending objections with
6 respect to summary judgment of infringement of
7 claim 10, do you agree with that?

8 MR. IWANICKI: I do to a certain
9 extent except that infringement and invalidity
10 are separate issues. And if, in fact, Judge
11 Burke said that all you need to do in order to
12 be definite to determine whether a hydrogel
13 forms within five seconds after contact with a
14 tissue is visually observe it, we think that's
15 the end. That's what the judge said. He said I
16 know how one of skill does that, Dr. Lowman
17 knows how one of skill does that, you look at it
18 and you see if it forms a visible solid
19 aggregate. That's the issue that we're talking
20 about here. That's different from to a certain
21 extent the summary judgment of infringement,
22 because they're going to allege that even if
23 there is -- you do agree with Judge Burke that
24 there is infringement there, they are still

1 going to come back and say there is this whole
2 issue with gel time, is it cured, fully cured.
3 None of that is in the claim, Your Honor. Judge
4 Burke decided what the claim meant.

5 THE COURT: All right. We'll come
6 back to this when we get to the claim 10 summary
7 judgment. Do you have any other arguments? I
8 think you referenced visualization agent, either
9 that or any others, where you see something that
10 the defendant is going to argue at trial that
11 you think is inconsistent with the claim
12 construction?

13 MR. IWANICKI: Your Honor, I think
14 we went through all of the headings that are in
15 our submissions and I don't see any other
16 issues, Your Honor.

17 THE COURT: Thank you.

18 Let's give the defendants a chance
19 to come up. It seemed to me there were maybe
20 two general areas that you thought the
21 plaintiffs were going to argue or present
22 evidence inconsistent with the claim
23 construction. Am I right at least to that
24 point, are there two?

1 MR. PIVOVAR: There are two. The
2 first one with respect to whether the hydrogels
3 from the prior art we had as Your Honor is well
4 aware, we had a long detour and a side show of
5 the case that went to this particular issue.
6 When it was resolved, how the Court resolved the
7 claim construction, I think it is pretty
8 straightforward that all of the arguments that
9 their experts had about why the prior art
10 hydrogels were not biocompatible is effectively
11 out. I don't know whether they disagree or not.

12 THE COURT: One of your categories
13 was the biocompatible composition limitation;
14 correct?

15 MR. PIVOVAR: That's correct.

16 THE COURT: And you believe that
17 they intend to offer something inconsistent with
18 the Court's construction of biocompatible
19 composition?

20 MR. PIVOVAR: The expert reports
21 that they have are there. I would hope that
22 they would.

23 THE COURT: Let's stop there.
24 Let's see. Are we ready to get agreement on

1 that?

2 MR. IWANICKI: No, Your Honor.

3 THE COURT: Come tell us what you
4 propose to do.

5 MR. PIVOVAR: This is just for the
6 hydrogel part. We'll get to the barium sulfate
7 issue second; right?

8 THE COURT: Okay.

9 MR. IWANICKI: Your Honor, I think
10 that one of the tensions with respect to this
11 claim and how it was interpreted is that we're
12 looking at claim 10 and claim 10 says the
13 composition suitable to coated tissue of a
14 patient. And we originally argued that was a
15 limitation of the claim and that it includes as
16 an aspect a biocompatible hydrogel. And the
17 Court agreed with us.

18 And so in Dr. Mays' opening expert
19 report, he talks about biocompatibility. We get
20 to this next phase of well, what does the term
21 biocompatible hydrogel mean or biocompatible
22 composition, and the Court determined that that
23 meant that a hydrogel or composition formed from
24 crosslinked biocompatible precursors. And so

1 essentially what the Court did is it said, I'm
2 not going to tell you what biocompatible means,
3 but I'm going to tell that biocompatible
4 composition is formed from biocompatible
5 precursors and turns out it still remains in the
6 claim. And so one of ordinary skill in the art
7 is going to need to know what that terms means.

8 And so we think it's fair with
9 respect to the term biocompatible as a part to
10 the phrase biocompatible precursor or
11 biocompatible hydrogel or biocompatible
12 composition that we should be able to provide
13 testimony as to what one of ordinary skill in
14 the art would understand that term in the claim
15 to mean. And so we think that because the claim
16 is in the -- the claim term is within the claim,
17 that the Court did not provide us with any
18 guidance as to a definition of biocompatibility,
19 that we're left to presenting our expert's
20 opinion as to what that means.

21 There is another issue here, Your
22 Honor. The term simple coated tissue of a
23 patient does not only mean a biocompatible
24 hydrogel, there are also aspects of what makes

1 something suitable coated tissue to the patient,
2 it's adherence. It's structural integrity. And
3 all of those opinions that we have relate to --
4 and it's also toxicity of the things that you
5 add in that aren't the precursors.

6 So what they're asking to be
7 stricken wholesale from all of these reports is
8 a lot of stuff related to whether barium sulfate
9 is going to be suitable -- when placed in a
10 hydrogel is suitable to coated tissue of a
11 patient, is it going to provide adherence? They
12 want that stricken. Is it going to provide
13 structural integrity? They want that stricken.
14 It's not limited to simply quote the definition
15 of biocompatibility.

16 I went through yesterday we were
17 provided with all of the citations from Mays'
18 report, all of the citations in his rebuttal
19 report as well as his two other reports and I
20 went through all of them, and I have notes that
21 actually identify -- this has nothing to do with
22 biocompatibility. It relates to
23 biodegradability. There is nothing in that
24 paragraph that talks about biocompatibility.

1 And so what they're trying to do is wipe away
2 this whole aspect of reteaching that it's barium
3 sulfate and it's thicker than collagen somehow
4 is not a biocompatible -- or it is a
5 biocompatible hydrogel when clearly all that is
6 required for a biocompatible hydrogel is that it
7 be formed from biocompatible precursors.
8 Whether you add something like barium sulphate
9 which is a toxic substance to it, that's not
10 inconsistent with the Court's claim
11 construction. That's not a biocompatible
12 precursor. But they're looking to exclude all
13 of that stuff, Your Honor.

14 THE COURT: Thank you. Now I'll
15 give defendant a chance to argue why you think
16 that is inconsistent now that we know that you
17 want to do it.

18 MR. PIVOVAR: So we construed the
19 term suitable to coat the tissue of a patient as
20 part of this case, and the Court said that it
21 should be construed as requiring a
22 biocompatibility requirement. And then the
23 Court construed the biocompatibility
24 requirement. I just heard him articulate

1 several limitations that aren't included in that
2 construction.

3 THE COURT: Right. But
4 biocompatible is in our construction of
5 biocompatible.

6 MR. PIVOVAR: Right. And that was
7 what we had the whole claim construction dispute
8 about because they said it should be
9 biocompatible and we said that's indefinite.
10 And what you're putting on the biocompatible in
11 the context of the patents can't really be
12 discerned because it's some level that we don't
13 even understand. And that's how we arrived at
14 this construction because of the indefiniteness
15 of the term biocompatible.

16 So if we're going to drag that
17 back into the case, it seems like it was
18 resolved as part of claim construction, but if
19 that comes back into play, if you look at the
20 briefing on it, that's what it was all about.
21 They said biocompatible means not harmful to the
22 tissue of patients. And our expert came and
23 said one, what does that mean? It doesn't make
24 any sense. Two, what's the objective standard

1 we apply from the specification for that? And
2 Judge Burke looked at all that and said yeah,
3 there is no -- nothing described that will get
4 you to biocompatible, so he construed the terms
5 we had in dispute as -- with respect to the
6 disputes we were having and said this is the
7 construction I'm arriving at.

8 So we would have to go back and
9 have a whole fight over indefiniteness of the
10 term biocompatible again which has been
11 resolved. That's why we think the Court has
12 already said these terms are fixed, they're set.
13 So that's on just the straight here is the
14 biocompatible hydrogel composition issue.

15 And they contest that there are
16 hydrogels that are applied from the prior art
17 that are made from, their experts admits, from
18 two biocompatible precursors, but they admit
19 they're two biocompatible precursors. Their
20 opinions are all directed towards the
21 construction they wanted applied that Judge
22 Burke rejected and Your Honor adopted. Those we
23 think should be out. From the perspective of
24 doing additional claim construction on this

1 term, I think we have been through it.

2 THE COURT: What about their
3 barium sulphate?

4 MR. PIVOVAR: So barium sulphate,
5 the issue with that is it's relatively
6 straightforward from our perspective, because if
7 you look at claim 1, so claim 1 is the
8 independent claim to claim 10 which is in
9 dispute. It says a visualization agent. We
10 look at claim 1 of the '566 patent, there is a
11 word in front of visualization agent, a
12 biocompatible visualization agent.

13 So the question really becomes is
14 there a reason that one claim requires a
15 visualization agent and the other one requires a
16 biocompatible visualization agent? In our view
17 they're basically arguing that barium sulfate is
18 not a biocompatible visualization agent, but
19 there is no requirement for that in the claim.
20 And that's the distinction that we feel should
21 be involved in that. It also folds into it's
22 relying on a construction of biocompatible that
23 would be indefinite.

24 THE COURT: All right. You made

1 reference to suitable coated tissue of the
2 patient. Is there more to say about that and
3 whether what they're trying to do with that is
4 inconsistent with the claim construction?

5 MR. PIVOVAR: It is, because
6 they're saying that -- we had a whole -- we had
7 a whole dispute about claim construction of what
8 suitable coated tissue of the patient meant.
9 They were willing to say it means biocompatible
10 when they thought they could win that issue and
11 it turns out that they lost. And now what they
12 want to say is okay, let's take another run at
13 it. We have some other things we want to build
14 into this particular requirement of this
15 preamble just to try and wiggle around the prior
16 art and get you to go back and redo it. We have
17 been through claim construction on that term.
18 They could have said at that time it requires a
19 biocompatible hydrogel that has all of these
20 other features that are required. And we could
21 have pointed out how that was wrong as well.
22 But they didn't. They wanted to hang their hat
23 on this biocompatibility argument, which they
24 brought up in your rebuttal expert reports for

1 the first time, costing us to have a whole
2 secondary round of expert reports, a secondary
3 round of summary judgment, they lose it and now
4 they're saying, oh, we have another argument to
5 make. And it doesn't seem like something we
6 should be doing two weeks before the trial, Your
7 Honor.

8 THE COURT: Do you want to
9 respond?

10 MR. IWANICKI: Yes, Your Honor.
11 Plaintiff's expert's opinions about barium
12 sulfate being added to a hydrogel and not
13 resulting in a composition suitable to a coated
14 tissue of a patient has been long standing.
15 Plaintiff's expert's opinions about barium
16 sulfate being toxic and so when added to the
17 composition of suitable coated tissue, a
18 hydrogel would not result in a composition
19 suitable for coated tissue of a patient has been
20 long standing. And Dr. Lowman's -- Dr. Mays'
21 reports he identifies the conditions for a --
22 for what one of ordinary skill in the art would
23 understand suitable for coated tissue of a
24 patient.

1 With respect to biocompatibility,
2 that was only one feature that was argued
3 because -- and asked for specific claim
4 construction on that issue, nothing else,
5 because it's quite clear that one of ordinary
6 skill in the art is going to understand you're
7 going to have something suitable coated tissue
8 of a patient, it's going to have to adhere, it's
9 going to have structural integrity and those are
10 two important features, Your Honor, and there is
11 nothing inconsistent with us offering opinions
12 with respect to barium sulphate as not a
13 precursor, that's not a precursor, so it doesn't
14 affect the visualization agent, not only is it
15 not a visualization agent, it is also not a
16 precursor. It is not inconsistent with how the
17 Court construed the claim.

18 And, in fact, Your Honor,
19 biocompatible is a feature of the claim. We won
20 that. It's now been the second stage what does
21 that mean and the Court took a circular argument
22 about biocompatible composition of hydrogel
23 means it's formed from biocompatible precursors
24 which is the claim term, so we're left with this

1 tension here. And, you know, one of ordinary
2 skill, for purposes of presenting this to the
3 jury, we're going to have to explain what this
4 claim means, not only for those terms construed
5 by the Court, but those that haven't been
6 construed by the Court, Your Honor.

7 So we think that everything that
8 they have asked to be stricken with respect to
9 barium sulfate or tibular collagen or
10 degradation, there is lots of degradation
11 paragraphs in there, none of that relates to the
12 quote biocompatible issue that they identified
13 in their submission yesterday.

14 THE COURT: All right. Anything
15 further on this from defendants?

16 MR. PIVOVAR: No, Your Honor.

17 THE COURT: Bear with me a second.

18 We'll come back to this. Are
19 there any other plaintiff opinions or evidence
20 that the defendants think they're sure are going
21 to be offered that are inconsistent with the
22 Court's claim construction?

23 MR. PIVOVAR: So we suspect that
24 they might have at trial, but we'll reserve our

1 right to object at that time.

2 THE COURT: All right. Let's talk
3 about the defendant's motion to sever the state
4 of proceedings with respect to claim 10 of the
5 '34 patent. We'll hear from the defendants on
6 this.

7 MR. GRAVES: Thank you, Your
8 Honor. First I would like to thank you for
9 rescheduling this so that Ms. Pascale and I
10 could go to our respective college graduations
11 for our daughters.

12 THE COURT: You're quite welcome.

13 MR. GRAVES: Your Honor, the R&R
14 from Judge Burke on claim 10 has made an already
15 interesting and unique situation all that much
16 more of a unicorn, so we're now just two weeks
17 out from trial and we have got a claim held by
18 the patent office as obvious, but also pending
19 Your Honor's review of our objection to the R&R
20 potential claim to be held infringed indirectly
21 by the defendant. So we think that has tipped
22 the scales in favor of severing out and staying
23 this one claim.

24 First, in terms of simplification,

1 the plaintiffs essentially argue that there is
2 very little difference between claim 10 and
3 claim 20. They're both from the same patent.
4 Well, these claims are very different. Claim 20
5 is a predetermined thickness claim, so it
6 overlaps significantly with the other
7 predetermined thickness claims. Claim 10 on the
8 other hand is much broader. It's about
9 essentially visualization agent like a dye in a
10 hydrogel that forms within five seconds or less.

11 So that -- those distinctions mean
12 we have completely different issues. Completely
13 different prior art is asserted by the defendant
14 with respect to claim 10 versus claim 20 or any
15 other asserted claim that remains. We have
16 completely different sets of inventors with
17 respect to these two claims. We have different
18 priority dates asserted by the defendants, or by
19 the plaintiffs with respect to these two claims.
20 So they are not the same. Teaching the jury
21 about the '034 patent in the context of claim 20
22 will not teach the jury about claim 10
23 whatsoever.

24 THE COURT: Would it simplify even

1 further if we sever and stay claim 20 as well?
2 Would you object to that?

3 MR. GRAVES: I would think that
4 would not really help because claim 20 is a
5 predetermined thickness claim and we're going to
6 be dealing with those other predetermined
7 thickness claims, so I think we ought to deal
8 with claim 20 while we're at it.

9 The claim 10 is very unique and
10 distinct and including it in the trial will
11 actually greatly complicate the issues and the
12 complexity of the case for the jury. So taking
13 it out will certainly simplify the issues.

14 Plaintiffs say there is very
15 little left to try about claim 10. We disagree
16 with that. They mention the R&R of
17 infringement, but they fail to mention that was
18 just as to indirect infringement. As far as we
19 know they still plan to present a direct
20 infringement case against HyperBranch with
21 respect to claim 10 which will carry its own
22 unique issues as to whether HyperBranch has
23 performed every step of the claim method
24 including forming a hydrogel within five

1 seconds.

2 Also, Your Honor, they claim that
3 we only have one invalidity defense left as to
4 claim 10, specifically anticipation by the Rhee
5 500 reference because the patent office declined
6 to institute IPR on that particular ground.
7 Their argument is that having won at the patent
8 office on obviousness, HyperBranch is now
9 estopped from defending itself against an
10 accusation of infringement in front of the jury.
11 It can no longer even assert that successful
12 combination of obviousness references or any
13 other piece of prior art we could have possibly
14 thrown into the IPR reference other than the
15 Rhee 500 reference. That strikes me as turning
16 the estoppel provision of the AIA on its head.

17 THE COURT: Are you able to cite
18 any authority on that point? I don't think you
19 have either. Has any court had to confront this
20 question that you're aware of?

21 MR. GRAVES: We're not aware of a
22 court having to confront a defendant
23 successfully invalidating the patent at the
24 patent office and the plaintiff taking the

1 position that there is estoppel that applies.
2 We found briefing in one case, it's pending now,
3 it hasn't been decided. Mr. Crenshaw can deal
4 with this later in more detail, but I can say
5 for now, first the language of the statute
6 doesn't support such a twisted outcome.
7 Estoppel means that you have taken a position
8 and lost, so you're barred from relitigating
9 that lost position. It doesn't mean if you have
10 won at the patent office you can't defend
11 yourself on the same ground before a jury when
12 faced with an accusation of infringement.

13 And the legislative history of the
14 AIA makes clear that the fundamental purpose of
15 it was to separate out weak patents from the
16 rest. And here we have the patent office
17 agreeing with us that this is an obvious claim.
18 We should not be estopped from so arguing in
19 front of the jury if it's going to be in the
20 case.

21 Your Honor referenced during the
22 April 6th status call that the possibility of
23 having detailed jury instructions in a special
24 verdict form to try to reduce the possibility of

1 a taint from claim 10 being in the case. But
2 the fact of the matter is, Your Honor, with
3 respect to the damages, taint is possible here.
4 There won't be any record evidence about claim
5 by claim allocation of damages. Neither damages
6 expert dealt with that. The plaintiffs say if
7 one claim is infringed, they get all the same
8 damages as if all of the asserted claims were
9 infringed.

10 And in the pretrial order meet and
11 confer process with submissions, you see the
12 plaintiffs made no effort whatsoever to provide
13 any sort of detailed instructions or special
14 verdict questions to try to minimize the
15 possibility, the prejudice, quite the contrary
16 --

17 THE COURT: So as I understand it,
18 your view would be if I put -- if I don't sever
19 and stay claim 10 and the jury returns a damages
20 verdict based on something like the instructions
21 of the verdict sheet proposed by the plaintiff,
22 and then as you expect on appeal claim 10 is
23 invalidated because the PTAB finding is upheld,
24 you're going to be back here arguing that I need

1 to retry damages because there would be no way
2 to sort out what impact claim 10 infringement
3 had on the jury's finding of damages. Is that
4 your position?

5 MR. GRAVES: That's correct. And
6 even more broadly, Your Honor, we might be back
7 here or the Federal Circuit arguing that the
8 inclusion of claim 10, particularly if the Court
9 adopts the R&R infringement, would just taint
10 the whole proceedings and then prepares we get a
11 reversal on infringement findings of other
12 claims and findings of not invalid. We think it
13 would be highly prejudicial to allow this claim
14 to stay in the case, particularly in light of
15 the R&R, if that gets adopted.

16 The plaintiffs argued on the other
17 hand they're the ones who are going to be
18 greatly prejudiced if this claim is severed out
19 and stayed. And they point in support for that
20 to their need for a permanent injunction should
21 they get a judgment of infringement on claim 10.

22 But look at the timing here. That
23 claim expires in less than six months, so if we
24 go through a jury trial and get a judgment of

1 infringement and not invalid on claim 10, we'll
2 have JMOL motions. We also need to schedule and
3 conduct the separate bench trial on equitable
4 estoppel which could take some time. It's quite
5 likely that the Court will not have sorted
6 through equitable estoppel and the JMOL motions
7 by the time this claim expires, so in terms of
8 the timing here, we think it's highly unlikely
9 that they would even be at the point of
10 litigating a motion for permanent injunction
11 before this claim 10 expires let alone getting
12 it decided by the court.

13 THE COURT: There was a reference
14 to another case or other litigation here. Did I
15 misunderstand that?

16 MR. GRAVES: No, you did catch
17 that correctly. We brought that up. There is a
18 second case that the plaintiffs filed on seven
19 patents directed to applicator devices and
20 assemblies that actually spray out or deposit
21 the hydrogels that are at issue in this case.
22 That case is trailing behind this one. It's set
23 for trial in March of 2020.

24 THE COURT: My understanding was

1 that you thought if I need another trial say on
2 claim 10 of the '034, one option might be to
3 move that claim over to that case.

4 MR. GRAVES: Exactly, Your Honor.
5 And the plaintiffs offered no response on that
6 whatsoever.

7 THE COURT: Is there a status
8 problem with your petition that you just
9 prevailed on?

10 MR. GRAVES: We don't believe so,
11 Your Honor. I haven't heard --

12 THE COURT: I wasn't sure, but it
13 seemed that perhaps you didn't get institution
14 on all the claims that you asked for.

15 MR. GRAVES: There was one claim
16 on which we did not get institution.

17 THE COURT: I take it you have not
18 been advised by the PTAB that that in any way is
19 going to impact the finality of the written
20 decision.

21 MR. GRAVES: No. And we had a
22 final written decision before that came out.

23 THE COURT: Let me hear from the
24 plaintiff on this motion, please. Good morning.

1 MR. ALTHERR: Your Honor, there is
2 three factors that need to be considered as to
3 whether or not a case should be stayed. One,
4 the stay would simplify the issues for trial.
5 Two, the status of litigation because the
6 discovery is complete and the trial date is set.
7 And three, the prejudice to the nonmoving party.

8 Now, staying the action will not
9 simplify the issues at trial. The Court already
10 considered this at our April 6th status
11 conference and went through in a very cogent way
12 to show that it would not simplify the issues.
13 In their brief they didn't argue that they would
14 simplify the issues. There is really very
15 little left for trial on the '034 patent. If
16 the Court adopts the report recommendation for
17 summary judgment infringement, that issue is out
18 of the way.

19 THE COURT: But if I don't, then
20 you're going to have to prove infringement;
21 correct?

22 MR. ALTHERR: But we'll still be
23 settling forth all the same limitations that
24 were in the predetermined thickness claims. The

1 predetermined thickness claims add a limitation.
2 All right. This one is different because it
3 doesn't have the predetermined thickness
4 limitation. That's all. But the visualization
5 agent has to be there and all the other
6 limitations that are in those claims. So you're
7 going to be having all those limitations anyway.

8 THE COURT: Is visualization agent
9 in some other claim that's going to trial no
10 matter what?

11 MR. ALTHERR: Yes, Your Honor.
12 Every predetermined thickness claim has the
13 visualization agent in it. The claim 10 has the
14 visualization agent in it. So you're going to
15 be going through all those same limitations.

16 The reason like I said that they
17 took out the claim 10 was because it is a
18 broader claim, it has fewer limitations, but all
19 those limitations are encompassed by what's in
20 the predetermined thickness. They're going to
21 get all that.

22 Additionally, you have the same
23 prosecution history that's involved. Claim 20
24 of the '034 patent is a predetermined thickness

1 claim. We're going to be going through that.
2 We are going to be going through the
3 specification. The jury is going to be taught
4 the specification, the prosecution history, the
5 prior art, the related patents, the '566 and the
6 '418 patents are all related and their
7 prosecution histories are related and have all
8 basically the same or very similar claim
9 limitations. And so the jury is going to be
10 taught all that.

11 Now, if you stay the case and go
12 up and decide that you're going to have another
13 trial in this, it's going to be a second jury
14 that's going to have to go through all that
15 stuff another time. All right?

16 So additionally, in addition to
17 the fact that you got all these common claim
18 limitations, all common prior art cited against
19 it, all of the common prosecution histories and
20 specifications, you do have an issue under
21 estoppel under 315(e)(2) estoppel. And I would
22 like to say just a little bit about that. I
23 have some slides here if I might pass them to
24 Your Honor.

1 THE COURT: Yes. Sure.

2 MR. ALTHERR: Now, the first thing
3 that I like to do, Your Honor, is point out the
4 language of 315(e)(2). And where it says, "The
5 petitioner in an inter partes review of a claim
6 in a patent under this chapter that results in a
7 final written decision under Section 318(a), or
8 the real party in interest or privy of the
9 petitioner, may not assert either in a civil
10 action arising in whole or in part under Section
11 1338 of the Title 28 or in a proceeding before
12 the International Trade Commission under Section
13 337 of the Tariff Act of 1930 that the claim is
14 invalid on any ground that the petitioner raised
15 or reasonably could have raised during that
16 inter partes review."

17 All of the prior art references
18 they cited against claim 10 in this case,
19 they're saying invalidated, are on the face of
20 either the '034 patent or the '566 patent which
21 is a continuation --

22 THE COURT: That much I think is
23 not in dispute, but do you have any authority
24 that says your interpretation of estoppel is

1 correct in these types of circumstances?

2 MR. ALTHERR: There is two parts
3 there, Your Honor. We're not just saying
4 estoppel on the successful part. If you look at
5 those references, the one that they have, the
6 Jacobs reference, that's an issue that we have
7 in this court right now. That's a reference
8 that they didn't raise, but they reasonably
9 could have raised it because they knew about it.

10 If you look on the second page,
11 you can see exemplary district court decisions
12 applying the plain meaning of Section 315 to
13 references the party knew or reasonably should
14 have known about, but did not raise in the IPR
15 petition. The Parallel Networks case --

16 THE COURT: Are those all could
17 have been raised estoppels?

18 MR. ALTHERR: Those are all could
19 have been raised estoppels.

20 THE COURT: Where is the estoppel
21 finding based on what was raised and a final
22 decision?

23 MR. ALTHERR: What was raised. Go
24 to the next slide. Your Honor, there is no

1 deciding decision with regards to what was in
2 fact raised, but there is a pending district
3 court motion right now in the BTG International
4 Limited versus Amneal Pharmaceuticals case
5 pending in the District of New Jersey, and that
6 is pending right now.

7 The only safe harbor that
8 precludes estoppel for references that were
9 known or reasonably should have been known from
10 controlling precedent is referenced theories
11 raised -- is references and theories raised in
12 the IPR petition but not instituted.

13 THE COURT: So if some court
14 ultimately finds that you're right, that
15 estoppel on its language applied even to what is
16 instituted and the petitioner prevails on it in
17 a final written decision, doesn't that just mean
18 that that is because it was anticipated that
19 either a plaintiff in your position would never
20 want to go to trial on a claim that had just
21 been found to be not patentable by PTAB, or that
22 no court would let the plaintiff do that and of
23 course would stay in a situation like this?

24 MR. ALTHERR: No, Your Honor, the

1 purpose of this section, the estoppel section,
2 was to give the petitioner one bite at the
3 apple. You elect what route that you're going
4 to go. The idea behind the whole act was to
5 limit the amount of litigation. If you decided
6 you were going to go the IPR route, you were
7 going to be estopped from what you actually
8 raised or could have raised. The statute is
9 very clear on that.

10 THE COURT: Wasn't part of the
11 idea also that they wouldn't thereafter have to
12 defend against being an accused infringer of a
13 patent claim that they managed to invalidate at
14 the PTAB?

15 THE WITNESS: No, Your Honor,
16 because they had the estoppel raised after the
17 final decision, but the final decision is not
18 final until after appeal. And that distinction
19 is very clear in those cases.

20 THE COURT: I do think that is
21 clear, but in terms of a discretionary decision
22 as to whether or not this jury should have to
23 make a finding as to whether a patent that the
24 PTO has now said is not valid, why -- you know,

1 I guess come to that broader argument. I think
2 the estoppel point cuts against you, but putting
3 that aside, why should I exercise my discretion
4 to have this jury decide infringement of a claim
5 that the PTAB has said shouldn't even exist at
6 this point?

7 MR. ALTHERR: Because what the
8 Federal Circuit is going to do is entirely
9 speculation. If you don't go ahead and try the
10 case this time with this jury, all right,
11 they're going to hear all that same evidence,
12 going to be taught all this stuff about the '034
13 patent, and then if it gets reversed and sent
14 down, then you're going to have to try it all
15 again on the '034 patent on claim 10 with a
16 brand-new jury. The parties are going to have
17 to go ahead and redo witness lists, redo exhibit
18 lists, redo a pretrial order and all those
19 things. So you're really not going to save --
20 it's speculation as to whether it's going to get
21 reversed or not.

22 Additionally, you have different
23 standards, as Your Honor very clearly noted, and
24 in saying that you are not going to allow

1 anything to go to the jury regardless of what
2 happens in PTAB, because they're different
3 standards, they shouldn't be confused. Because
4 of the different standards, that is a very good
5 reason why this jury should be able to hear the
6 issues with respect to the claim 10 of the '034
7 patent.

8 Now, but I do want to reiterate
9 one thing on this 315 estoppel. Putting the
10 point aside, the points of what the PTAB found,
11 is because the estoppel, they cannot raise the
12 Jacobs issue, that's something they could have
13 raised. They cannot raise the obviousness over
14 thing, and they cannot raise the -- I guess it
15 was obviousness over Rhee 500 itself.

16 Even if you allow it to go to
17 trial and hear the invalidity evidence, the
18 amount of invalidity evidence is even if you
19 allowed the successful argument, it would be two
20 invalidity grounds on prior art, not the five.
21 So a lot of the case has already been
22 simplified.

23 THE COURT: What about direct
24 infringement, are you going forward on that?

1 MR. ALTHERR: No. Direct
2 infringement on the '034, we are not going to
3 assert vicarious liability, or vicarious
4 infringement.

5 THE COURT: So you're dropping
6 with prejudice your direct infringement claim on
7 claim 10?

8 MR. ALTHERR: Yes, Your Honor.

9 THE COURT: Okay. Anything else
10 on this stay?

11 MR. ALTHERR: Well, the other
12 thing is the stage of the proceedings. As you
13 indicated, that strongly disfavors granting the
14 stay in this case. The discovery is complete
15 except for the deposition we got going forward
16 of Dr. Mettler tomorrow, but trial is scheduled
17 for May 29th. So the stay pending the final
18 appeal, the Federal Circuit appeals is not going
19 to promote the interest of justice.

20 Now, look at the prejudice to the
21 plaintiffs. We are direct competitors, and the
22 -- in our brief we cited to the LifeTech Corp.
23 case and the Cooper Tech versus Thomas & Betts
24 which says that that is a factor which should

1 weigh in heavily the prejudice to plaintiffs
2 when they are direct competitors in staying a
3 case. And you should be looking to the
4 prejudice to the nonmoving party, not what
5 HyperBranch argues is prejudice to them.

6 The second part is the parties
7 have already expended significant expense and
8 energy just to get to trial. We're going to
9 have to do it all over again if you stay and go
10 out and have another trial.

11 THE COURT: What about the risk
12 that I'm going to have to do another trial if I
13 don't stay because of at least the damages
14 issues and the way you all have chosen to
15 present it?

16 MR. ALTHERR: I'm sorry. Could
17 you say that again?

18 THE COURT: What about the risk
19 that I'm going to have to do another trial if I
20 don't state because you're asking the jury to
21 return a damages verdict that will be impacted
22 by claim 10 and the jury being told that the
23 defendant infringes and there is a chance, of
24 course it's speculation, but there is a chance

1 that the Federal Circuit will agree with the
2 PTAB.

3 MR. ALTHERR: Your Honor, the jury
4 can be instructed in such a way that claim 10
5 with regard to the issue of infringement was
6 left to the Court, reserved to the Court and
7 they don't have to consider it.

8 As far as on damages and that, in
9 the instructions we put in that, we can tailor
10 the instructions if you believe that that is a
11 threat. Our damages theory, what is supported
12 by the license for the patents-in-suit, is that
13 the royalties are paid whether one claim is used
14 or all the claims are used. The royalties is
15 the same amount because the royalties is based
16 upon what the product category is. These are
17 products that have been approved by the FDA.
18 The one license which is the basis for both
19 experts determining what is a reasonable royalty
20 provided that.

21 If you look at Magistrate Judge
22 Burke said it was appropriate the damages did
23 not have to be apportioned on a claim-by-claim
24 basis. That was an order --

1 THE COURT: Isn't the bottom line
2 that the risk of a new trial, a second trial is
3 at least as great if I do what you want as if I
4 do what they want?

5 MR. ALTHERR: Your Honor, I think
6 it's pure speculation.

7 THE COURT: We're dealing in
8 speculation, but the odds are good in their
9 favor just based on statistics that they're
10 going to win their appeal in the Federal
11 Circuit, whereas there is also odds it would
12 seem to me that you win at this trial and you
13 get a damages award that at least based on how
14 you were asking me to instruct the jury and put
15 a verdict sheet in front of them, we'll never
16 know what impact a finding of infringement of
17 claim 10 had on it, meaning I'm going to have to
18 do it all over again.

19 MR. ALTHERR: No. The jury
20 instruction could be tailored to specifically
21 ask that question.

22 THE COURT: Have you given me that
23 instruction?

24 MR. ALTHERR: No, Your Honor, we

1 have not.

2 THE COURT: Wasn't the deadline a
3 day or two ago for that?

4 MR. ALTHERR: Yes, Your Honor,
5 that was.

6 THE COURT: Why should I be
7 confident that you're going to give me that
8 instruction in the next few days?

9 MR. ALTHERR: The parties still
10 have a number of disputes on the jury
11 instruction. I know they are going to have to
12 be resolved. And I'm sure when we get up
13 through the trial there will be issues.

14 THE COURT: What about a verdict
15 sheet, are you guys going to be open to a
16 verdict sheet that makes the jury have to break
17 out patent damages on a patent by patent or
18 claim by claim basis?

19 MR. ALTHERR: I wouldn't say for
20 all of the patents, Your Honor, we break out
21 claim 10, and that would be very easy for the
22 jury to do.

23 THE COURT: So you would not
24 oppose, you think there is some promise there to

1 do that?

2 MR. ALTHERR: I think that could
3 be done. That would save everyone a lot of
4 trouble. That would save a second jury from
5 having to hear all the same evidence over and
6 over again.

7 THE COURT: What about this other
8 proceeding and the possibility that if I do have
9 to do something, a second trial, that I might be
10 able to move it over and be part of that other
11 case?

12 MR. ALTHERR: Once again, Your
13 Honor, that throws another patent in the case.
14 It makes that case more complex. All the other
15 patents are related in the case. There is two
16 families. They deal with applicators. They
17 don't deal with the chemistry. You're
18 complicating the case a lot more by bringing in
19 all these other issues, all the things that
20 we've already battled in this case. And it
21 would make it very complex for the jury.

22 THE COURT: Thank you. I'll give
23 defendants a chance for rebuttal.

24 MR. GRAVES: Your Honor, I think

1 that Mr. Altherr's concession that they're
2 claiming as a matter of damages that they get
3 the same amount of damages whether one claim is
4 infringed or all is really self defeating here,
5 because it points to the lack of true potential
6 prejudice to them from going forward without
7 claim 10 which will likely be found invalid by
8 the Federal Circuit.

9 On the other hand -- and he says
10 well, we can deal with claim 10 separately in
11 the verdict sheet, but they haven't done that
12 yet. And we don't know how as a practical
13 matter the parties can even present a case to
14 the jury on how to allocate damages on a
15 claim-by-claim basis or just for claim 10 versus
16 all the other claims. There is just no evidence
17 in the record to support any sort of position
18 like that from either side. We think it would
19 be impossible. Sure, we could put a separate
20 question on the verdict form, what are the
21 damages for claim 10 if you find infringement
22 and not invalid, but there would be nothing in
23 the record to guide the jury on how to even
24 answer that question.

1 So I also want to point out the
2 patent owner here did not file a petition for
3 reconsideration at the PTAB on the final written
4 decision, so the clock is ticking on the
5 deadline for notice of appeal. And that appeal
6 should be well in front of any appeal by any one
7 or both sides here to the Federal Circuit of the
8 ultimate final judgment entered in this case.

9 So we think it's highly likely
10 that the validity of claim 10 will be decided by
11 the Federal Circuit based on the appeal of the
12 PTAB ruling long before we get up to the Federal
13 Circuit from any appeal from this case.

14 So what we have here, Your Honor,
15 I think in short is a situation where if this
16 claim goes forward in the case, we have got
17 really a baked in issue for a reversal and a
18 remanned, we're going to be back here again.
19 Whereas it's much less likely if we sever it and
20 stay, it's never going to come back here because
21 the Federal Circuit would confirm the obvious
22 recall.

23 And the prejudice to us from
24 including it in the trial is enormous. And the

1 prejudice to them of keeping it out is virtually
2 nil, doesn't impact their damages and they're
3 never going to get a permanent injunction based
4 on infringement of this claim.

5 As I explained, and we got no
6 response, there is no way we're going to have a
7 preliminary injunction motion fully adjudicated
8 and decided before this claim expires before
9 November of this year to say nothing of
10 substantial hurdles of irreparable harm.

11 Thank you, Your Honor.

12 THE COURT: Thank you. All right.
13 Let's move on now. I'll hear from defendants
14 first on plaintiff's motion for reconsideration.
15 I think it was filed yesterday. My simple
16 question is whether the defendants have figured
17 out their position and whether they oppose the
18 motion.

19 MR. CRENSHAW: Thank you, Your
20 Honor. Steve Crenshaw on behalf of defendant.
21 We do oppose their motion in two respects. I
22 think there are three real issues that they
23 raised. First is Mr. Jarosz's price erosion.
24 We don't contest that that was properly

1 disclosed as damages within the United States.
2 I think there might have been some imprecision
3 in the wording, so we do not contest that.

4 With respect --

5 THE COURT: And is that the full
6 pool of the relief they're seeking with respect
7 to Mr. Jarosz?

8 MR. CRENSHAW: No. They also want
9 to allow Mr. Jarosz to double dip in effect by
10 asserting a reasonable royalty inside the U.S.
11 on top of their price erosion damages. And
12 those numbers were never disclosed in
13 Mr. Jarosz's reports. I'm happy to go into that
14 issue now or would you like me to continue the
15 overview?

16 THE COURT: Let's finish the
17 overview. There is a third issue; right?

18 MR. CRENSHAW: There is a third
19 issue with Dr. DiStefano. I think you heard
20 some argument on Dr. DiStefano's
21 biocompatibility argument. And his specific
22 infringement opinions were related to the 5,705
23 patent which is no longer in this case, it's
24 out, it's not going to be going before trial.

1 We don't believe he had anything
2 disclosed in his report that merits inclusion in
3 the trial now that the 5,705 is out. And what
4 plaintiffs are arguing is well, Dr. Mays is
5 relying on his opinion related to the 5,705 for
6 interpretation of the 3,705 patent.

7 Dr. DiStefano didn't say that my
8 opinions are related to the 3,705 patent. He
9 didn't say that they were related to the issues
10 that are still live in trial. Dr. Mays who is
11 trying to drag back in the 5,705 biodegradable
12 issues so that they can try to put more evidence
13 in the record for appeal purposes. We don't
14 believe Dr. DiStefano's report has anything in
15 there that is still live and should be addressed
16 at trial, so we do oppose that part of the
17 motion for reconsideration.

18 THE COURT: Just a little bit
19 more. So the first thing that you see them
20 asking for with respect to Jarosz's price
21 erosion opinion, say again what it is you don't
22 oppose.

23 MR. CRENSHAW: We believe that
24 Mr. Jarosz should be able to present his price

1 erosion opinion on price erosion inside the
2 United States. That was fairly disclosed in his
3 August 25th report. We certainly disagree with
4 just about everything he has to say on it, but
5 we weren't seeking to exclude that in our motion
6 in limine and we don't believe that should be
7 excluded.

8 THE COURT: So to the extent their
9 motion is seeking me to reconsider and allow him
10 to do what you just said, you think I should
11 grant that. You don't oppose it.

12 MR. CRENSHAW: We don't oppose it.
13 I'm not sure that Your Honor's ruling
14 necessarily excluded that, but just for clarity
15 sake, I think it's fair to say Mr. Jarosz can
16 present his price erosion opinions at trial and
17 we will cross-examine him.

18 THE COURT: With respect to the
19 other part of Jarosz's opinion excluded, you
20 oppose their request for reconsideration.

21 MR. CRENSHAW: Yes, Your Honor.
22 In terms of reasonable royalties within the
23 United States, we do oppose their motion for
24 reconsideration. And our primary problem here

1 as Your Honor may recall, Mr. Jarosz has
2 submitted now it will be four or five reports,
3 expounding very different opinions.

4 His first report on August 25th
5 had three basis for damages, lost profits for
6 lost sales based on the market share
7 apportionment theory; lost profits for price
8 erosion; and finally, a reasonable royalty which
9 had components both inside the U.S. and outside
10 the U.S.

11 Because the market share
12 apportionment theory was not disclosed during
13 discovery, the Court struck Mr. Jarosz's opinion
14 and gave him a chance to put in a new opinion if
15 they could credibly do so.

16 Mr. Jarosz put in a new report on
17 November 24th, and that report replaced his
18 opinions on lost profits for lost sales and his
19 opinions for reasonable royalty. It didn't
20 touch the price erosion and that's the reason
21 we're not disputing that now.

22 But for lost profits for lost
23 sales, Mr. Jarosz went all in and said 100
24 percent of sales within the United States would

1 be subject to lost profits for lost sales. And
2 as a result he replaced his reasonable royalty
3 opinion and said reasonable royalties are five
4 percent of outside the U.S. sales and he
5 provided no opinions, no numbers, nothing for
6 reasonable royalties within the United States.
7 And he specifically noted that residual
8 royalties for infringing sales upon which they
9 did not receive lost profits are for accused
10 sales outside the U.S.

11 So we have this shell game now
12 where defendants are trying to go back to
13 Mr. Jarosz's original August 25th report and say
14 that's his true reasonable royalty report
15 despite the fact that Mr. Jarosz had an
16 opportunity to either reaffirm those opinions
17 that he disclosed there or provide alternative
18 theories and he never did that. So what we have
19 is we have Mr. Jarosz being very clear in one
20 opinion as to what his reasonable royalty
21 opinion was, it was entirely outside the U.S.
22 That opinion was eventually -- the lost profits
23 component of that was eventually struck because
24 he was just not credible.

1 Now they're trying to go back and
2 say well, Mr. Jarosz preserved that because he
3 noted that his opinion was that in the event
4 lost profits damages are found to be inevitable,
5 reasonable royalty damages are to be calculated.

6 Now, plaintiffs aren't saying in
7 their motion for reconsideration Mr. Jarosz that
8 should be able to chose between price erosion
9 and reasonable royalty, they want to double dip.
10 They want to be able to say for United States
11 sales, they're subject to both price erosion and
12 a reasonable royalty. And that opinion is not
13 disclosed I don't believe anywhere in
14 Mr. Jarosz's report. It's certainly not
15 disclosed in the November 24th report which
16 directly contradicts that.

17 So the plaintiffs had a choice of
18 damages. And they are certainly entitled on a
19 finding of infringement of a nonvalid claim to
20 compensation and that compensation must be no
21 less than a reasonable royalty. What they
22 aren't entitled to is expert testimony that they
23 are entitled to a reasonable royalty in addition
24 to price erosion damages.

1 Mr. Jarosz's damages theory is
2 that price erosion inside the U.S. is
3 compensation for infringement. And so their
4 claim that they're entitled to put in expert
5 opinion on reasonable royalty within the United
6 States in addition to price erosion compensation
7 just -- that's not required by the statute.

8 THE COURT: So he did disclose an
9 opinion on reasonable royalties within the U.S.
10 in the August 25th opinion, but your view is he
11 later in November disclosed a different opinion
12 which has the effect of superseding what he
13 disclosed in August?

14 MR. GRAVES: His reasonable
15 royalty opinion for the August 25th report was
16 based on market share apportionment. His
17 numbers were a percentage of the sales, the
18 percentage of sales that weren't accounted for
19 in his lost profits, lost sales calculations.
20 So now they're not saying that same percentage,
21 they're saying no, all U.S. sales are subject to
22 a reasonable royalty in addition to the price
23 erosion damages.

24 THE COURT: And that opinion has

1 been disclosed no where?

2 MR. CRENSHAW: I don't believe
3 they'll be able to point you to it. I haven't
4 seen it. To the extent they're going to point
5 to footnote 541 on page 94, paragraph 260 of
6 Mr. Jarosz's original report, we believe that
7 was superseded by both plaintiff's decision to
8 pursue price erosion damages as compensation for
9 U.S. sales and Mr. Jarosz's subsequent report
10 where he didn't disclose any U.S. royalty
11 numbers and instead relied exclusively on
12 outside the U.S. sales.

13 So the real problem we have is
14 what are his opinions. We thought we had one
15 thing, they're now trying to go back to his
16 original report which was stricken in various
17 respects. And they had a chance to put in a new
18 report that clearly laid all this out, but they
19 didn't want to commit to any of that. They just
20 gave us a supplemental report that had some
21 notations from the old report, never was able to
22 find what was still operative or not. And it's
23 precisely this problem we're now facing that
24 shows just how problematic their approach was.

1 THE COURT: On the DiStefano, if I
2 don't grant reconsideration, are you going to
3 object to Dr. Mays' testimony where he will say,
4 I guess, part of my opinion is based on this
5 other expert, DiStefano.

6 MR. CRENSHAW: I don't believe so,
7 Your Honor. There doesn't seem to be any reason
8 to bring Dr. DiStefano on. Dr. Mays is entitled
9 to rely on that in forming his expert opinion.
10 He can tell the jury I talked to another doctor
11 who said this. But Dr. DiStefano's underlying
12 opinion is irrelevant to any issues.

13 THE COURT: Thank you. The
14 plaintiffs response to their motion.

15 MR. CRENSHAW: Thank you, Your
16 Honor.

17 MR. ALTHERR: Your Honor, I
18 assumed price erosion gets a little closer, we
19 will present that in evidence.

20 THE COURT: With respect to that
21 first point on price erosion, I'm granting your
22 motion to reconsider to the extent necessary to
23 allow you to do that.

24 MR. ALTHERR: What I would like to

1 do is put a little part of the motion for
2 reconsideration.

3 THE COURT: Why don't we talk
4 about DiStefano first, because they I thought
5 pretty clearly said in their motion that he was
6 only offered for the 5,705 and you didn't
7 respond to that. And we relied on your failure
8 to respond. And now I see you have other things
9 you want to do with him. Why is that a
10 meritorious basis for reconsideration?

11 MR. IWANICKI: Thank you, Your
12 Honor. Your Honor, Dr. DiStefano's report
13 addressed the limitation resistant enzymatic
14 degradation. He provided opinions as to what
15 resistant enzymatic degradation means. He
16 reviewed the accused product. He reviewed all
17 of the patents in the lawsuit and he provided an
18 opinion as to what resistant enzymatic
19 degradation means and that the accused products
20 meet that limitation. Now, resistant enzymatic
21 degradation is a limitation found in the 3,705
22 patent.

23 THE COURT: This may be all true,
24 but what I found is plaintiffs do not contend

1 that DiStefano's testimony is relevant for any
2 issue that will be the subject of the trial.
3 Where in your response to the motion in limine
4 did you tell me something contrary to that?

5 MR. IWANICKI: Your Honor, I'm
6 telling you, I'm telling you now that with
7 respect to resistant enzymatic degradation,
8 Dr. Mays relied on his opinion with respect to
9 the 3,705 patent.

10 THE COURT: But when I had to make
11 this decision, I had to rely on what you all
12 argued, and I think, but again, correct me if
13 I'm wrong, I think you didn't make this argument
14 at the time I had to make this decision. Is
15 that correct?

16 MR. IWANICKI: Your Honor, it was
17 what they had presented was an exemplary list,
18 Your Honor, it wasn't a complete list in their
19 motion in limine. And so, Your Honor, this
20 issue is one where Dr. Mays very clearly in all
21 of his expert reports, there is no surprise
22 here, in all of his expert reports relied on
23 Dr. DiStefano's opinion in order to reach his
24 opinion with respect resistant enzymatic

1 degradation. It's not limited to the 5,705. It
2 is an opinion that is with a consistent claim
3 limitation between those two patents.

4 THE COURT: I'm told that they
5 will not object to Dr. Mays indicating that he
6 relied on Dr. DiStefano. Why at this point do
7 you need Dr. DiStefano?

8 MR. IWANICKI: I think the jury
9 would benefit from live testimony. I think
10 that, you know, having someone refer to a piece
11 of paper and say this is what the piece of paper
12 says and I adopt it is probably -- it's going to
13 be better for the jury to hear the live
14 testimony from Dr. DiStefano, sir.

15 THE COURT: All right. We'll get
16 Mr. Altherr here. He's going to talk about the
17 first issue.

18 MR. ALTHERR: The only issue that
19 we have got left on this end is the extent to
20 which Mr. Jarosz should be able to provide
21 opinion testimony with regard to his calculation
22 of reasonable royalty. They don't contest that
23 he's allowed to do some reasonable royalty with
24 regard to reasonable royalty outside the United

1 States. They are saying that we superceded our
2 prior computation of reasonable royalty and
3 therefore dropped it. Well, that's not the
4 case, Your Honor.

5 What happened was they have tried
6 a number of times to strike both price erosion
7 and the reasonable royalty. The magistrate has
8 ruled against them. You ruled against them.
9 Even after we were allowed to submit the
10 supplemental, we still had to carry forward the
11 price erosion from the August 25th and the
12 reasonable royalty from the August 25th opinion.

13 Now, in that August 25th opinion

14 --

15 THE COURT: How do we go from a
16 November opinion that he still continued all his
17 reasonable royalty opinions from August?

18 MR. ALTHERR: This is the November
19 opinion, November 28. You look at paragraph 22.
20 It says, "For the infringing sales upon which
21 Integra does not receive lost profits, Integra
22 is entitled the reasonable royalty damages." He
23 ended that one the same way he ended the August
24 25th after he went through, to let it be known

1 in some event the lost profits was disallowed
2 which was happening in this case, not allowed to
3 get lost profits for lost sales, that we would
4 rely on reasonable royalty.

5 THE COURT: Is this the number
6 that he's going to offer at trial in paragraph
7 22?

8 MR. ALTHERR: What that is, that
9 number relates to the number for the sales
10 outside the United States.

11 THE COURT: So where is he
12 indicating that he still has an opinion as to
13 reasonable royalties within the United States
14 and what that dollar figure is?

15 MR. ALTHERR: He did the
16 calculation, Your Honor. The calculation, that
17 goes back to his August 25th report.

18 THE COURT: But where in the
19 November opinion, because I think we can see
20 it's not paragraph 23. Where does he put the
21 defendant on notice that he continues to believe
22 that reasonable royalties are available within
23 the U.S. and here is what they are?

24 MR. ALTHERR: Because he said for

1 anyone that didn't receive lost profits, he said
2 we're entitled to lost profits. That's in the
3 opinion. All right? And that's what he asked
4 for, where he provided it. And so we're saying
5 if you don't get lost profits, then you're
6 entitled to a reasonable royalty. He's only
7 calculated reasonable royalty in one way, except
8 on sales, and that was according to the way he
9 set it out in his August 25th, 2017 report.

10 Now, when he went to the report to
11 claim lost profits from lost sales on the
12 two-player market, there were no U.S. sales
13 because that was all based on U.S. sales. Once
14 that got knocked out, then you fall back on the
15 infringing sales which he didn't receive lost
16 profits and you apply the same exact
17 calculation. They're not being prejudiced in
18 any way. The calculation he put it in in great
19 detail in the first report, he has the reference
20 exactly how to apply it here. As you can see,
21 he puts down applying the reasonable royalty
22 rate to all accused sales results in reasonable
23 royalty damages at that time [REDACTED] through
24 April 2017 calculated as royalty rate times the

1 total Adherus U.S. and outside U.S. revenues,
2 equals [REDACTED] times [REDACTED] equals
3 [REDACTED] and [REDACTED] --

4 THE COURT: You don't have to read
5 all of this. I'm still left with the question,
6 this is August; correct?

7 MR. ALTHERR: This is August, yes.

8 THE COURT: In and around November
9 through today, or due very recently, how would
10 the defendants had known that that was the
11 opinion that he intended to offer with respect
12 to damages?

13 MR. ALTHERR: Because as he set
14 forth in there, he had the August 25th report,
15 he still relied on all the parts which had not
16 been stricken. The whole price erosion is in
17 the August 25th report. You're allowing that.
18 They're not contesting that. That's always in
19 the August 25th. The calculations for a
20 reasonable royalty was in the August 25th report
21 and had not been stricken. They tried to get it
22 stricken, but they didn't get it stricter.

23 THE COURT: Why shouldn't they
24 have understood that the supplemental would

1 supercede what he had opined earlier?

2 MR. ALTHERR: Because he said in
3 here on paragraph 22 of the November report that
4 the infringement sales for which he did not get
5 lost sales, that you would be able to get a
6 reasonable royalty.

7 The patent statute is clear that
8 you're entitled to damages adequate to
9 compensate for the infringement. And many cases
10 have held you can get reasonable royalty and
11 price erosion, which has always been the
12 position all the way through. Now, when he was
13 taking the position that he was entitled to lost
14 profits from lost sales, which this Court
15 subsequently decided he was not, he still said
16 if you didn't get lost sales, you would get at
17 least reasonable royalty damages.

18 THE COURT: Thank you. Do the
19 defendants want to briefly respond?

20 MR. CRENSHAW: Thank you, Your
21 Honor. I think Your Honor has it mostly
22 correct. The November 24th report doesn't
23 disclose anywhere U.S. royalties. If you look
24 at supplemental tab 3 which is referenced in

1 paragraph 22, this is what I was talking about
2 where the numbers for U.S. royalties are zero.
3 So our understanding based on paragraph 22 which
4 says if lost profits are not available then
5 reasonable royalties, lost profits include price
6 erosion. So Mr. Jarosz in his November 24th
7 report had a lost sales component lost profit
8 and a price erosion component. He never said if
9 price erosion is not shown, then reasonable
10 royalty. He said if lost profits are not shown.

11 So our understanding of his
12 opinion was lost profits and lost sales 100
13 percent, price erosion and a reasonable royalty
14 component for outside the U.S. So I think if
15 Your Honor just looks at tab 3 you will see
16 there is no disclosure of U.S. royalties and
17 then for footnote 37 on paragraph 23, which
18 Mr. Altherr didn't show you says that residual
19 royalties are for outside the U.S. sales.

20 Thank you.

21 THE COURT: Thank you. Let's talk
22 briefly about the defendant's objections to that
23 R&R regarding summary judgment of infringement
24 of claim 10 of the '034 patent. I know we had

1 gone through some of this earlier. Let's focus
2 on it.

3 MR. PIVOVAR: I told you we would
4 be back with the picture. One of the issues
5 that comes up with is basically what our
6 objections fall down to is this. All of the
7 evidence that Magistrate Judge Burke relied on
8 and what was presented to support the idea that
9 the hydrogel forms within five seconds is all
10 related to a gel time.

11 THE COURT: A gel time?

12 MR. PIVOVAR: A gel time. So just
13 to show you how this works. When you mix two of
14 these things, you have these precursors and they
15 react with each other. And I know you have seen
16 briefing on it. They form a reaction mixture
17 after they mix and that initiates a chemical
18 reaction. And as that chemical reaction
19 proceeds, what you're doing is you're causing
20 these different freestanding components to start
21 to link up. At some point of that process,
22 you're going to have enough of them connected
23 that they're going to form a three-dimensional
24 network. There will be other parts that are

1 still floating inside that that will then cure
2 over time.

3 You see you have you mix, you go
4 all the way down and at some point you get
5 equilibrium at some point in the future. What
6 happens, you mix this up, it reacts, then you go
7 to what is known as a gel time which all the
8 experts in the case agree can be measured in
9 lots of different ways and it varies. And even
10 plaintiff's own expert has evidence they point
11 to where it could be one second or up to
12 four-and-a-half seconds for the accused products
13 which shows you a pretty big stretch.

14 So the argument we had was if
15 you're going to use gel time, which is the very
16 initial point when it gets some kind of metric
17 of being defined as a gel time, there is
18 different ways of measuring it, so there are
19 different ways of getting different times, and
20 that's why we have that indefinite.

21 So Dr. Mays recognized oh, if I go
22 with gel time, it will be problematic. So
23 during his deposition he said no, I think for
24 claim 10 the requirement has to be a fully cured

1 hydrogel. You're going to see a solid aggregate
2 at the gel time. You'll see that. You'll see
3 solid aggregate from here all the way on. But
4 he said well, I know there are different ways to
5 measure gel time. I'm going to say it's a fully
6 cured hydrogel. A fully cured hydrogel
7 according to Dr. Mays is that all of these
8 components that can link up are there.

9 So what we have is this issue.
10 This is Jell-O. I don't mean to be like to
11 pedantic about this, but if you have made
12 Jell-O, you know you have to leave it sit for a
13 really long time, about four hours. That's what
14 the instructions say. But if you do it for less
15 amount of time you get a soft set or a firmer
16 set. So you're going to have a solid aggregate
17 at the set time or the gel time which is two of
18 the things that Magistrate Judge Burke and
19 plaintiffs point to. But if you want it to be
20 all the way fully cured, you have to wait the
21 four hours. Hydrogel, Jell-O is a hydrogel.
22 It's got a dye in it. Different chemistry.
23 You're not going to want to eat it the way these
24 products are used, but the same concept.

1 So we asked Dr. Mays, we asked
2 him, so in the context of claim 10 it says that
3 the hydrogel forms. Do you see that? Yes. Now
4 the hydrogel forms, that means there is a fully
5 cured equilibrated hydrogel. Yes. And then we
6 asked him, what does that mean. He says you
7 react to all the functional groups that can
8 react.

9 I don't want to be rearguing these
10 issues, but it's the clarity that we need is
11 that the order says essentially well, you have a
12 fully cured hydrogel at the gel time and those
13 are just, kind of just scientifically not true,
14 because when you have a fully cured hydrogel,
15 you reacted all the functional groups that can
16 react, not that you're just at the stage where
17 you have enough of them to form a solid. There
18 is a distinction here and we play this out in a
19 brief. Can you go back to the next slide.

20 This is the problem we have,
21 regardless of whether you call it gel time, set
22 time or cure time or fully cured gel, it doesn't
23 matter, but each one of those things is a
24 different metric associates with a different

1 time frame on that graphic that we looked at.

2 What we have now is we have an
3 order from Magistrate Judge Burke that says
4 well, it is a fully cured hydrogel. But then he
5 says, well, it's a visible solid and then he
6 points to evidence about gel time and set time.
7 So there is a lot of different metrics that are
8 being applied within the context.

9 So let me just show you one of the
10 distinctions of why this is important in terms
11 of how the products are actually applied. So
12 this is a gel time measurement. And before we
13 go into this, I just want to say, one of the
14 things about a gel time measurement is it's
15 controlled so that when you squirt all the
16 material together, so it starts at one time.
17 Remember we talked about the indefiniteness of
18 the claim and I talked about how mixing can take
19 different amounts of time, in this experiment
20 you're controlling this to have everything mix
21 all at once.

22 If you click on the slide, you
23 have this spinning experiment and then if you
24 squirt everything in all at once and then it

1 stops. Could we go back and do it again. It's
2 a short video. Right.

3 So you see the little thing in
4 there spinning, it's in a liquid, that's one
5 precursor. You squirt in the other one and it
6 stops. Between the time when you squirt it in
7 and it stops, that's the gel time. What you can
8 see in here in the video, that's a solid
9 aggregate. Pick it up, there you go. So that's
10 a gel time measurement. Is that a fully cured
11 hydrogel? Is that going to meet the visible
12 solid aggregate part of the claim of how the
13 Court applied it for infringement? Because that
14 is an experiment that we're going to show to the
15 jury. If they say it's a fully cured hydrogel,
16 I don't think our expert is going to say that's
17 a fully cured hydrogel because not all of the
18 crosslinks have happened. And it's the same
19 thing with the accused products, not all of the
20 crosslinks have happened, so it really is just a
21 question of what does this claim mean and that
22 was the issue we had.

23 THE COURT: So if I sustain your
24 objection, would I be telling the jury that you

1 need to have a fully cured hydrogel within five
2 seconds?

3 MR. PIVOVAR: That's right,
4 because our position was, and this is how we
5 briefed it and we reargued it back to Your
6 Honor, if you go with the gel time, you saw that
7 spinning disc and it stopped, that's one
8 measure. There is lots of other different
9 measures. All of the experts in the case agree
10 there is different ways you can get gel times
11 and the numbers will change. So that's where we
12 had our indefiniteness argument if you use a gel
13 time or something initial.

14 THE COURT: If you don't have an
15 indefiniteness objection, it would tell the jury
16 that you need a fully cured hydrogel within the
17 five seconds?

18 MR. PIVOVAR: Yes. And then it
19 comes down to the fully cured hydrogel means
20 that all of the crosslinks have been formed in
21 the hydrogel.

22 THE COURT: That's what you would
23 propose the instruction is?

24 MR. PIVOVAR: That's right,

1 according to what their own expert said. If you
2 go to the slide we had right before the gel time
3 experiment, I think you can see how this plays
4 out. This is something you have to get numb to,
5 but this is an actual application of what we
6 have, the product, we have a video of this
7 ready. And that is not it.

8 Right here, Your Honor. So what
9 you're going to see is the person spraying this
10 over -- I think you probably saw pictures.
11 They're spraying this over the incision site.
12 And it's hitting it and it's setting because you
13 want it to stick. But if you're going to have a
14 fully cured hydrogel, that's not the fully cured
15 hydrogel yet because they spray more on, and
16 more of it has to crosslink and it's building up
17 a bigger hydrogel.

18 And you can just see from the time
19 of the application getting all the way to the
20 fully cured hydrogel that you have at the end of
21 the application is taking a lot longer than five
22 seconds. That's the issue that we have is the
23 application process drags that out.

24 So if we did say it's fully cured,

1 it's a fully cured hydrogel, you have to put it
2 at all of the crosslinking has been formed
3 because as you put down more layers you get more
4 crosslinking because you're building it up more.
5 If that's the appropriate construction, then
6 yes, we believe that would be definite.

7 THE COURT: Okay. Thank you.

8 MR. PIVOVAR: Thank you, Your
9 Honor.

10 THE COURT: I'll hear from
11 plaintiff.

12 MR. ALTHERR: Your Honor,
13 Magistrate Judge Burke reconciled the motion for
14 summary judgment. What HyperBranch is arguing
15 now is that the Court erred in conflating fully
16 cured with gel time. Fully cured is not a -- or
17 gel time, either one of those, are terms that
18 are in the patent claim. And they are not what
19 magistrate judge construed the language to mean.

20 The operative language there is
21 the hydrogel forms within five seconds.
22 Magistrate Burke said that means that you have a
23 visible solid aggregate has been formed which
24 can be determined by way of visual inspection.

1 Now, there is no dispute that that
2 is exactly what they have in the accused
3 product. HyperBranch's own documents show that
4 it forms a solid aggregate within five seconds.

5 Start down at the very bottom, the
6 Adherus products, polarize to form a hydrogel.
7 Film when sprayed on to the surgical site, an
8 immediate polymerization time ranging between
9 0.96 to 1.47. The immediate polymerization.
10 That's their chart that shows what their product
11 does. They also state that the Adherus hydrogel
12 allows for such rapid self polymerization that a
13 watertight barrier is formed within one second.
14 If it's a watertight barrier, it's a visible
15 solid aggregate that's been formed.

16 THE COURT: Are you saying that
17 it's done reacting and it's complete in these
18 time frames?

19 MR. ALTHERR: No. The reaction,
20 they are not saying that it's fully cured or
21 that it's a complete crosslinked reaction.
22 That's not what the claim requires and that's
23 not what Judge Burke said that it meant. All
24 you had to do was form a solid aggregate as

1 determined by visual inspection.

2 Now, according to that claim
3 construction that he had, which is correct,
4 there is no dispute that their documents meet
5 that, or their products meet that. Their
6 enablement documents specify that it happens
7 within those amount of times numerous times.

8 THE COURT: I don't think that's
9 in dispute. I don't think they're arguing about
10 that at this point.

11 MR. ALTHERR: Their own expert
12 testified that he uses visual inspection to see
13 if the hydrogel has been formed, to determine if
14 it's there. So the prior art that they relied
15 on, that U.S. Patent 7,964,217 says that the
16 hydrogel that is formed is visible in solid
17 aggregate.

18 So all of this, all right, is
19 really an attack upon Judge Burke's claim
20 construction, which definitely he is right.
21 Visible solid aggregate has been formed as
22 determined by way of visual inspection. If you
23 adopt that claim construction that they had,
24 then there is no dispute their product meets the

1 clearance of that claim construction and,
2 therefore, summary judgment is appropriate.

3 THE COURT: What about what
4 Dr. Mays said about fully cured?

5 MR. ALTHERR: Dr. Mays has said a
6 number of things. They're pulling one part out
7 of context out of his whole testimony. If you
8 look at his whole testimony, he said that when
9 it forms a solid, you can see it.

10 THE COURT: Okay. But what about
11 the portion where he says, "I mean, fully cured,
12 we have completed all of what we can complete."

13 MR. ALTHERR: He didn't mean
14 complete -- he meant fully cured meaning you
15 form the solid aggregate. He didn't mean
16 crosslinking was completed. Crosslinking could
17 go on for hours.

18 THE COURT: Okay. Anything
19 further on this?

20 MR. PIVOVAR: No.

21 THE COURT: Anything further from
22 the plaintiff on this?

23 MR. ALTHERR: Your Honor, if I may
24 add one more thing. One of the things that

1 Judge Burke was relying on, too, when he came up
2 with that claim construction was that the -- he
3 said the Court further noted that Dr. Lowman was
4 able to assess by visual observation whether a
5 sufficient amount of crosslinking between
6 functional groups had occurred such that
7 hydrogel was formed. Even their own expert says
8 you don't have to have it fully cured, just a
9 sufficient amount of crosslinking.

10 THE COURT: Thank you. Anything
11 further from the defendant?

12 MR. PIVOVAR: Briefly, Your Honor.
13 I just wanted to go back to what Dr. Mays'
14 initial report said and what plaintiffs relied
15 on in their opening brief. And that is you see
16 the gel time here and it's a gel time of less
17 than one second is what he says in the first
18 paragraph. He comes down, he says I also
19 conducted gel time experiments, and he says a
20 mean gel time of 3.26 seconds and a standard
21 deviation of 1.1. That's up to almost four
22 seconds.

23 What you heard from plaintiffs
24 just then is it's not all the way fully cured at

1 the gel time. If you take this evidence in
2 light most favorable to us, that's 4.5 seconds
3 and then it gets to a fully cured hydrogel by
4 five. If you don't have any other additional
5 questions.

6 THE COURT: What about Dr. Lowman
7 apparently talking about sufficient
8 solidification.

9 MR. PIVOVAR: So those are taken
10 out of context. Eventually if you have a solid
11 and you let it go long enough, and look at it,
12 and keep in mind, too, when they point to this
13 other reference it says a visible solid
14 aggregate has been formed which in theory all
15 the crosslinks have been formed. Because if you
16 wait long enough, it will cure because curing
17 takes time. And what Dr. Lowman was saying, if
18 I can just put this on, I think I have this on.
19 It's universally accepted among the experts and
20 all the documents that hydrogel forms at the gel
21 point.

22 So the point being is that what it
23 means to have a hydrogel forming has different
24 connotations. Are you talking about the

1 hydrogel forming at the gel point? Are you
2 talking about having a hydrogel form when it's
3 fully cured? And that's the difference.

4 And when they say oh, Dr. Lowman
5 is talking about gel formation, he's talking
6 about this context of the gel form and the gel
7 time. We'll leave it at that. That's it.

8 THE COURT: Obviously we have got
9 a lot of R&Rs. On this one, Judge Burke did his
10 claim construction in connection with ruling and
11 making a recommendation on summary judgment; is
12 that correct?

13 MR. PIVOVAR: That's right.

14 THE COURT: Did you propose a
15 construction that he rejected.

16 MR. PIVOVAR: Yes, we proposed if
17 it's gel time, it's indefinite. It has to be a
18 fully cured hydrogel at the end point of that
19 graphic, which is all of that crosslinks that
20 can form have formed.

21 THE COURT: Thank you very much.

22 MR. PIVOVAR: Is there any chance
23 that we can make a request that we can take a
24 short recess?

1 THE COURT: Yes. We will do that
2 in just a moment. Plaintiff, do you have
3 anything else on this motion?

4 MR. ALTHERR: No, Your Honor.

5 THE COURT: Let's take a short
6 recess.

7 (A brief recess was taken.)

8 THE COURT: All right. Let me
9 tell you where we are. I have about a half an
10 hour still this morning and then I have to take
11 a break and I'll meet you back here at two
12 o'clock to cover whatever we don't get to
13 between now and when we take a break.

14 I'm going to give you a ruling on
15 one of the issues that we argued this morning.
16 And then I may have more rulings for you later
17 when we come back.

18 The issue that I am ready to rule
19 on is the defendant's motion to sever and stay
20 the proceedings with respect to claim 10 of the
21 '034 patent, I have decided to grant this
22 motion.

23 We have maybe not a unique but
24 certainly unusual situation where we are just a

1 couple weeks from trial and we have had a final
2 written decision from PTAB finding that this
3 claim is not patentable and at the same time I
4 have an R&R from the magistrate judge
5 recommending that I grant summary judgment
6 finding that this same claim is infringed.

7 So this raises an interesting,
8 again, perhaps unique situation and certainly
9 one that I have not found and the parties have
10 not found in any court confronting and deciding
11 to this point. It presents a discretionary
12 decision and in my view the proper exercise of
13 my discretion looks different now than if did
14 when we talked about what things looked like in
15 early April.

16 And my view is that my best
17 exercise of my discretion is not to put this
18 claim in front of the jury at that time, May 29.

19 How did I reach that conclusion?
20 I had considered the simplification factor and I
21 am persuaded that my decision to sever claim 10
22 will simplify this trial. At a minimum it takes
23 out any argument that the jury should hear about
24 the IPR, the PTAB, and its findings.

1 Similarly, if I were to adopt
2 Judge Burke's R&R on claim 10, it takes out the
3 complications of telling the jury that the
4 defendant has been adjudicated to be an
5 infringer while still at the same time asking
6 them to be open minded and decide that the
7 defendant is an infringer on other claims.

8 It takes out any issues that
9 remain with respect to infringement and
10 invalidity as to claim 10. I'm not yet ruling
11 on whether I'm adopting the R&R, so I can't yet
12 say whether there would be something about
13 infringement left to try.

14 In terms of invalidity, I am at
15 this point not at all persuaded by the
16 plaintiff's argument that the defendant would be
17 estopped from presenting invalidity defenses
18 only to prevail in front of the PTAB, so my
19 belief is that my decision is simplifying the
20 case by removing from the jury's presentation
21 invalidity defenses that otherwise I would have
22 to allow to be put forward by the defendant as
23 part of this trial. So I do think my decision
24 will simplify the case.

1 I recognize that the status of the
2 case is one where I'm making this decision very
3 late in the day and the parties are almost
4 entirely completed in their preparations to try
5 claim 10, but the reality is we got the decision
6 from the PTAB when we did. We got to the
7 summary judgment issue with respect to claim 10
8 when we did. And there is still issues related
9 to that that are open since I haven't ruled on
10 the objections. And while certainly the later
11 in the case an issue like this comes up, the
12 less likely the court is to grant the stay and
13 sever. That is only one factor, not
14 dispositive, and here I have weighted and the
15 full balance.

16 In terms of prejudice, I recognize
17 the parties are direct competitors. But this
18 particular claim is due to expire soon, I
19 believe in November of this year, so I'm
20 persuaded by the defendant that even if the
21 plaintiff were to go to trial in May on claim 10
22 and prevail, and there was no decision from the
23 Federal Circuit in the meantime affirming the
24 PTAB, there is enough litigation here that it

1 seems almost impossible to imagine that the
2 plaintiff would persuade me to enter injunctive
3 relief on the basis of this claim before it
4 expired in November. That's without even
5 considering issues related to the public
6 interest and irreparable harm.

7 Further, I do think it's fair to
8 the prejudice to the defendant, I alluded to how
9 the defendant would be prejudiced, he would be
10 prejudiced if we go forward either by me
11 estopping them from having a jury consider
12 defenses on which they prevailed, which is what
13 the plaintiff asked me to do, or having to
14 defend against a claim on which they have
15 prevailed without the jury hearing anything
16 about those proceedings or how they prevailed.
17 And I don't think that given the full context I
18 should be prejudicing the defendant with respect
19 to this claim in that way.

20 Further, if I look down into the
21 future with respect to the simplification
22 factor, I do think the risk of having to do
23 another trial with you all related to this case
24 is significantly greater if I go forward on

1 claim 10 at this point than if I do not.

2 While it is inherently
3 speculative, the odds seem to me much greater
4 that if we present damages to the jury in the
5 way the plaintiffs have asked me to, in the way
6 they developed their evidence, in the way they
7 have asked me to instruct the jury and the
8 verdict sheet they have asked me to give to the
9 jury, it seems much more likely I would be
10 buying a second trial at least on damages
11 because the odds are that the PTAB decision is
12 going to be affirmed on appeal, so that seems a
13 greater risk. And to avoid the greater risk
14 than an alternative risk, which I recognize
15 which is that you all may be back here just to
16 try claim 10 of the '034 patent after the
17 Federal Circuit reverses the PTAB, that is a
18 possibility, it seems to me much less likely.

19 And I further say there are issues
20 that have been reserved for a bench trial in
21 this case, there is another case, and you all
22 have thrown at me and Judge Burke an inordinate
23 number of decisions, so I think this case more
24 so than others is one that we're all likely to

1 get to know each other very, very well over the
2 next many years because it's hard to imagine as
3 hard as Judge Burke and I try that the Federal
4 Circuit is going to agree with everything that
5 we have done, so it seems to me the odds are you
6 are coming back and we are going to have more
7 trials in this case regardless, which is all the
8 more reason for me to do what I think is right
9 which here I think the correct discretionary
10 decision is to take claim 10 of the '034 patent
11 out.

12 So that's the only ruling I'm
13 giving you. Now, a number of the other issues
14 that have been argued this morning and some that
15 are still on the agenda are implicated by claim
16 10 of the '034 patent. I'll ask that during the
17 break you think about what impact this has on
18 any of the other issues that have been argued or
19 the ones that we're about to argue, but if
20 either of you have a position offhand, if you
21 thought through what you would want me to do
22 with respect to other issues that related to
23 claim 10, if in fact as I have now, I have
24 stayed claim 10, I would be happy to hear it.

1 Let me ask the defendants first.

2 MR. CRENSHAW: Your Honor, one of
3 the issues that we're going to discuss later and
4 that was raised in the pretrial order relates to
5 depositions of German doctors, Dr. Jacobs and
6 Mettler. Those are currently set to go forward
7 tomorrow. They relate solely to an invalidity
8 argument related to claim 10.

9 We have a host of issues with
10 those depositions going forward tomorrow, but I
11 think Your Honor's ruling relieves us of those
12 issues. I would just say that any depositions
13 of Drs. Jacobs and Mettler would be postponed
14 and we can deal with them in an appropriate
15 manner at an appropriate time. And I think
16 that's the only other one that we have.

17 Thank you.

18 THE COURT: I guess plaintiff, if
19 you want to respond to that. Do you object to
20 the depositions not going forward tomorrow?

21 MR. ALTHERR: Yes, Your Honor. We
22 have made substantial arrangements. Dr. Mettler
23 is in Germany. Dr. Mettler is very busy. She's
24 a very aged person. We want to be able to

1 preserve that testimony. Now, one way, one
2 possible way that we could moot it is if you
3 would rule that as pursuant to 315(e)(2) that
4 they are estopped from presenting the Jacobs
5 reference because that's a reference that's on
6 the face of the patent, and they knew or -- they
7 either raised it or could have raised it. And
8 the majority of district courts have held that
9 that is a proper basis for estoppel. If they
10 would be estopped on that reference then the
11 deposition would not have to go through,
12 however, in order to preserve her testimony, she
13 is an aged woman.

14 THE COURT: There is two
15 depositions for tomorrow. Are you asking that
16 both of them go forward?

17 MR. ALTHERR: I thought it was
18 just Dr. Mettler for tomorrow and -- if Jacobs
19 is going forward, we want that one, too, also,
20 Your Honor, for the same reason.

21 THE COURT: Let's get this
22 resolved. Are there two scheduled for tomorrow?

23 MR. CRENSHAW: Your Honor, it's
24 our understanding they are supposed to go back

1 to back. I would ask Mr. Altherr to identify
2 the substantial preparation. As far as we know,
3 there will be a conference call, a court
4 reporter will be sitting in Arizona with the
5 co-counsel, Mr. Shaw will be taking it
6 telephonically and the doctor will be in
7 Germany. And we don't have any contact
8 information for my court reporter or any other
9 personnel in Germany. We have no way of getting
10 documents that we may want to use on
11 cross-examination with the witnesses. This has
12 been slapped together and we have been kept in
13 the dark on the preparation. They hadn't told
14 us how this is going to go forward or how this
15 is going to preserve testimony that could be
16 presented to the jury. This is a conference
17 call that could be transcribed. We are not sure
18 what oath will be given if there will be anyone
19 there to administer an oath. We don't believe
20 substantial preparations have taken place and we
21 have serious, serious concerns about going
22 forward tomorrow. As Mr. Alter said, he thinks
23 there is only one deposition.

24 THE COURT: Can we get some

1 clarification from plaintiff?

2 MR. ALTHERR: Well, Mr. Shaw, who
3 is our co-counsel is handling the depositions is
4 not here. I would like to during the break be
5 able to contact him on that.

6 As I did say, these are aged
7 people. They are old. And if you're going to
8 stay this case for a period of could be a couple
9 of years, and that we may very well lose that
10 testimony. So the deposition should go forward
11 in order to preserve that, unless Your Honor is
12 willing to say that they are estopped from
13 presenting that evidence which the majority of
14 district case law supports.

15 THE COURT: Okay. Thank you. I
16 don't think the defendants have addressed
17 whether you're estopped from pressing the Jacobs
18 reference. Who wants to speak to that?

19 MR. GRAVES: We haven't heard of
20 that argument until yesterday, I believe. But I
21 haven't seen case law for the proposition that
22 where there is institution on obviousness
23 grounds the patent is held obvious, institutions
24 denied on one particular alleged anticipatory

1 reference, that the petitioners then forever is
2 estopped from asserting any other possible
3 anticipatory reference. I think that's their
4 argument here.

5 THE COURT: If I understand it,
6 Jacobs is cited on the face of the patent.

7 MR. GRAVES: It is.

8 THE COURT: So it could have been
9 raised as a grounds for institution and
10 invalidity, couldn't it?

11 MR. GRAVES: It could have based
12 on its appearance on the face of the patent.

13 THE COURT: Why does that not mean
14 you're estopped?

15 MR. GRAVES: Well, we haven't
16 gotten to the point -- this patent is going to
17 be, we believe, invalidated in any regard. So I
18 think with Your Honor's severing and staying
19 claim 10, the issue of IPR estoppel doesn't even
20 need to be addressed right now. I think it's
21 effectively moot.

22 THE COURT: That may be, then the
23 plaintiffs are going to want to go forward with
24 the depositions, which you have now requested I

1 not make them go forward with. They say they're
2 aging and they might well preserve testimony, it
3 likely will be years before we get to try claim
4 10 at this point, so why not preserve this
5 testimony.

6 MR. GRAVES: We could preserve it,
7 take their depositions next month after the jury
8 trial. There is no reason to have to go forward
9 tomorrow, particularly since we just got
10 documents from the plaintiffs at the close of
11 business yesterday after we have been asking for
12 them for months regarding these depositions. We
13 haven't had a chance to prepare and go through
14 those documents. And as Mr. Crenshaw outlined,
15 there is a lot of question marks about how this
16 procedure is even going down tomorrow, and we
17 have mediation tomorrow and we have trial in two
18 weeks. We should be devoting our resources to
19 trial on the issues that are going to go
20 forward. We're happy to take their depositions
21 next month. I haven't heard testimony that
22 they're so aged, they're sick and won't be
23 around in four to six weeks.

24 THE COURT: What about the

1 suggestion now not to cancel it forever, but you
2 all have a lot of other things to do. Why not
3 push it back by a month?

4 MR. ALTHERR: Your Honor, as I
5 said, it is set to go tomorrow.

6 THE COURT: All right. You're not
7 able to tell me about the preparations or the
8 details. When we come back at two o'clock you
9 let me know because they raised a lot of good
10 questions that in fairness you're not able to
11 answer about what's going to happen tomorrow.

12 MR. ALTHERR: That is correct,
13 Your Honor.

14 THE COURT: We'll have the answer
15 at two o'clock. I would ask during the break
16 also that you all think about whether or not you
17 still want me to recall on all of the other
18 issue about claim 10 that have been argued this
19 morning, so I want your positions on that.

20 With your remaining time before I
21 have to break, let's try to turn to some of the
22 other issues that I identified that I didn't
23 resolve in the earlier order. We'll start with
24 defendant had a request to depose plaintiff's

1 experts on the content of their supplemental
2 expert reports. This was identified around page
3 20 of the pretrial order. Let's hear from the
4 defendants if that's still a ripe issue that I
5 need to resolve.

6 MR. PIVOVAR: Your Honor, I think
7 this is probably something that's been mooted by
8 the Court's claim construction.

9 THE COURT: You're not asking for
10 any relief on this?

11 MR. PIVOVAR: No. At the time we
12 were, but not anymore.

13 THE COURT: Fair enough. Any
14 question about that from plaintiff?

15 MR. ALTHERR: No, Your Honor.

16 THE COURT: Okay. Then I was next
17 unclear if plaintiffs had a position on whether
18 they're going to assert a theory of joint
19 infringement or vicarious liability with respect
20 to the direct infringement of claim 10 of the
21 '034 or claim 5 of the '566 patent which is not
22 severed in this case from 10. And we talked
23 about direct infringement four, that's been
24 dropped as I understand it. What about claim 4

1 of the '566 patent?

2 MR. ALTHERR: We will not -- we
3 will be asserting direct infringement, but not
4 vicarious liability.

5 THE COURT: You will be asserting
6 direct infringement, but not by vicarious
7 liability?

8 MR. ALTHERR: That's right, Your
9 Honor.

10 THE COURT: Do the defendants have
11 any concerns about that?

12 MR. TIGAN: Your Honor, I was
13 going to address this issue, but in light of
14 that, no preference.

15 THE COURT: Thank you. I didn't
16 know about the plaintiff's position about
17 whether you intend to assert doctrine of
18 equivalents infringement to any claims of the
19 3,705 patent?

20 MR. ALTHERR: No, just literal
21 infringement on 3,705.

22 THE COURT: Any concerns about
23 that from the defendant?

24 MR. CRENSHAW: No, Your Honor.

1 THE COURT: All right. The
2 plaintiffs were asking that the defendants be
3 made to disclose the invalidity theories on
4 which the defendant intends to proceed at trial.
5 Given all of the rulings to this point, is there
6 still an issue with respect to that?

7 MR. IWANICKI: Yes, Your Honor.

8 THE COURT: Come to the podium and
9 let me know what you're looking for.

10 MR. IWANICKI: Your Honor, what
11 we're looking for is for them to tell us what
12 invalidity positions with respect to 112 they're
13 actually going to bring. They have never done
14 that. They have never told us for this claim,
15 this is what our 112 defense is going to be.
16 They haven't itemized that, Your Honor.

17 THE COURT: Okay. Let me see what
18 the defendant feels.

19 MR. CRENSHAW: Respectfully, Your
20 Honor, we have told them and we have told them
21 in our expert reports and we told them in our
22 disclosure of prior art grounds.

23 THE COURT: So you are going
24 forward on all of those defenses you have

1 disclosed?

2 MR. CRENSHAW: Based on our
3 invalidity case especially with respect to 112
4 issue is necessarily a rebuttal case. So our
5 invalidity positions on 112, written
6 description, enablement and indefiniteness are
7 going to be based on how they present their
8 case. They're not telling us the infringement
9 theories they're going to go forward on and how
10 their experts are going to be interpreting and
11 specifically going beyond the proper scope of
12 the claims, so we don't know exactly how we're
13 going to present our 112 issues until we have
14 heard what they are going to disclose. They
15 have the information --

16 THE COURT: Could you at least
17 tell us, there is however many asserted claims,
18 I have forgotten at the moment, which types of
19 defenses you are going to present to the jury
20 with respect to each of those claims.

21 MR. CRENSHAW: We have, Your
22 Honor, for the predetermined thickness claims,
23 we have the issue of indefiniteness as
24 Mr. Pivovar pointed out for gel time. We don't

1 believe there is sufficient disclosure for
2 visualization agent causing a categorical color
3 change.

4 We have disclosed all of these.
5 We're not sure exactly what they're asking. If
6 they are asking us and I believe in their
7 submission they're asking us to be held to a
8 specific set of arguments, we have disclosed
9 those arguments. If they are asking for a list,
10 I mean, I guess we could look through the expert
11 reports and compile the headings.

12 THE COURT: I think what they're
13 worried about is that they're going to prepare
14 to respond to all of the defenses and all of
15 your expert reports and then you're going to
16 show up at trial and present a subset of those
17 and they will have wasted their time.

18 MR. CRENSHAW: Again, our 112
19 defenses are primarily a backstop against the
20 interpretations that they're going to present at
21 trial. So to the extent that their experts
22 don't veer outside of what is properly enabled
23 or what we believe has been the scope of the
24 claims, we won't have those to present. What

1 they're really asking us to present is they're
2 asking us to disavowal those defenses ahead of
3 trial and we're not prepared to do that at this
4 point in time.

5 If they agree that they won't
6 present argument that runs afoul of 112 issues,
7 then certainly we won't be presenting 112.

8 THE COURT: With respect to
9 obviousness and anticipation, you have disclosed
10 to them specifically which of those defenses you
11 are going to assert?

12 MR. CRENSHAW: Absolutely, Your
13 Honor. That's in the pretrial submissions. It
14 was in the disclosure of prior art grounds. And
15 I don't think I have heard anything that says we
16 have not complied with the Court's orders in
17 that regard, or that they are somewhat unclear
18 as to what we will be presenting.

19 And I will just note that, Your
20 Honor, that the invalidity case, our invalidity
21 case for claim 10 was a large, large portion of
22 our invalidity case outsized as compared to the
23 other two, so I think we have already
24 significantly narrowed the invalidity issues

1 that we will present at trial.

2 THE COURT: All right. Does any
3 of that help?

4 MR. IWANICKI: Your Honor, I think
5 that it would be helpful for them to provide us
6 with a list of what their invalidity defenses
7 are going to be with respect to 112. I have got
8 a document here which is the proposed defendant
9 proposed verdict form and there isn't anything
10 in here identifying what the claim limitations
11 are with respect to what's invalid under 112 and
12 what's not. So it would be helpful, Your Honor,
13 if they were to provide us with something more
14 than go look in the expert reports and make --

15 THE COURT: Well, with respect to
16 anticipation and obviousness, do you have what
17 you need?

18 MR. IWANICKI: Yes, Your Honor.

19 THE COURT: So we're just talking
20 about 112?

21 MR. IWANICKI: Yes.

22 THE COURT: All right. And what
23 about the argument that they need to see what
24 you all do with respect to your interpretation

1 of the claims and what you present at trial?

2 MR. IWANICKI: I think, Your
3 Honor, the interpretations of the claims are --
4 we received the Court's claim construction, and
5 so to the extent that they think that there are
6 issues with respect to the Court's claim
7 construction, then they should be identifying
8 those now.

9 There are some positions that are
10 weaker than others with respect to those in
11 their expert report, and we have as Your Honor
12 knows, we have got a limited number of time to
13 present issues at trial, and so you know, I
14 think you hit it on the head where we're going
15 to be preparing for everything because they
16 haven't told us that anything is excluded and
17 then they're going to show up with a subset of
18 these things.

19 In my view, Your Honor, it's just
20 forcing us to do some unnecessary preparation
21 for trial when they should be with respect to
22 their burden identifying, you know, what actual
23 112 invalidity defenses they're going to be
24 bringing by identifying the claim limitations,

1 whether they lack written description, whether
2 they lack enablement, whether it's indefinite,
3 but they should be able to do that.

4 THE COURT: So what you're looking
5 for is with respect to all of your asserted
6 claims for them to tell you if they're going
7 forward on enablement, written description
8 and/or indefiniteness?

9 MR. IWANICKI: And the reason
10 therefor. I mean, it's indefinite because of
11 this phrase. It lacks enablement because of
12 this. We're not asking them to cut and paste
13 whole sections of their expert report, give us a
14 list, tell us what you're going to be proceeding
15 at trial.

16 THE COURT: All right. Do you
17 want to respond?

18 MR. CRENSHAW: Your Honor, we're
19 happy to pull out a list of that on the
20 condition that plaintiffs identify to us what
21 their infringement theories are going to be
22 especially with respect to the visualization
23 agent. They have had disclosures that the
24 visualization agent is a dye, it's air bubbles,

1 it is a dye plus air bubbles. And they have
2 presented all of those in their expert report.
3 They haven't disavowed any of those. And we
4 don't know what those are going to be, so
5 dependent on that issue our 112 issues are going
6 to be impacted.

7 Also, we don't know what exactly
8 what they're going to rely on for the observable
9 change. Is it obscuring? Is it a change from
10 pink to green? Is it a deep green? Is it an
11 even green? All of these have been disclosed by
12 plaintiff's expert so we're also shooting at a
13 moving target here. So our response is
14 necessarily predicated on what they're going to
15 present. If they disclose to us what those
16 specific issues are, we can happily narrow down
17 our disclosures. However, we have disclosed to
18 them the basis for indefiniteness, written
19 description and enablement.

20 THE COURT: Are plaintiffs willing
21 to disclose further what you're going to do on
22 your infringement case consistent with what was
23 just asked for?

24 MR. IWANICKI: Your Honor, the

1 issue, we're working with the Court's claim
2 construction with respect to how the Court
3 construed visualization agent. If they have a
4 issue with respect to the indefiniteness of that
5 claim or lack of written description or lack of
6 enablement, they do it outside of anything we
7 present. I mean, again, you have got this sort
8 of dichotomy here. You got infringement and you
9 got invalidity, and they should be able to
10 identify based upon the Court's claim
11 constructions whether or not they're going to
12 pursue any position with respect to 112
13 invalidity defenses.

14 THE COURT: Okay. I'm not
15 granting any relief on this. Certainly the
16 parties are free to and encouraged to meet and
17 confer as you narrow your case and define what
18 you're going to do. And if you can work out a
19 mechanism with which you're both comfortable
20 with that you disclose with more specificity to
21 one another to hopefully save each other time
22 and energy preparing for things that are going
23 to be part of trial, that would be great, but
24 I'm not persuaded that plaintiffs are somehow in

1 an unfairly prejudicial situation and is
2 entitled to any relief on this score.

3 Certainly nobody is going to be
4 allowed to present something at trial that was
5 not adequately disclosed in discovery and expert
6 reports prior to trial. And if either side
7 thinks that's what's happening, you should let
8 me know and I will deal with it at that time.

9 A couple more. Plaintiffs had
10 objections to Dr. Lowman and to Dr. Flombaum.
11 Is that something different than what we have
12 already talked about in connection with all
13 these other motions? This was at pages 26 and
14 27 of the pretrial order.

15 MR. ALTHERR: No, Your Honor,
16 that's exactly what we covered, but I'm still
17 uncertain on Dr. Flombaum's position. Is he
18 going to be permitted to testify? Because his
19 theory was strictly color matching. You can't
20 do it from memory to take paint and go pick out
21 in a paint store a specific color you want to
22 match your wall.

23 THE COURT: Right. So that again
24 I think is going to require you all to meet and

1 confer and apply my ruling from earlier today
2 and figuring out if you think there is anything
3 else for that witness to testify to. But in any
4 event, we have discussed I think the issues that
5 you meant to flag for my attention at pages 26
6 and 27. Is that right?

7 MR. ALTHERR: Yes, Your Honor.

8 THE COURT: Defendants, anything
9 further to say on Flombaum and Lowman?

10 MR. PIVOVAR: No, Your Honor.

11 THE COURT: Okay. HyperBranch had
12 objected to plaintiff's identification of
13 Dr. Jacobs and Mettler on the witness list.
14 Those are the same folks that are subject to the
15 deposition tomorrow; is that right?

16 MR. CRENSHAW: Yes, Your Honor --

17 THE COURT: I think that they're
18 not going to be on the witness list at trial.

19 MR. CRENSHAW: Right. And I think
20 that's wrapped up in all that. So a slightly
21 different issue, the depositions going forward
22 tomorrow we'll address afterwards, them being on
23 the witness list. I presume they'll be removed.

24 THE COURT: I think that's right.

1 I think given my ruling to sever, there is no
2 other basis to put these two witnesses on the
3 witness list for trial. Is that right?

4 MR. ALTHERR: That's correct, Your
5 Honor.

6 THE COURT: How about this,
7 Mr. Thomas Harrison, the defendants object to
8 calling him; right?

9 MR. GRIMM: I'll speak to this
10 one, Your Honor. I was prepared yesterday to
11 decide who was going to do what and this one
12 seemed like the simplest and easiest to
13 understand and present, so I was unanimously
14 chosen.

15 The issue really is very simple,
16 Your Honor. It's whether plaintiff should be
17 permitted to call Thomas Harrison as a witness
18 even though they never disclosed him in the Rule
19 26 disclosures or in response to
20 interrogatories.

21 We think that Your Honor should
22 preclude Mr. Harrison from testifying first
23 because he was not timely identified in their
24 Rule 26 disclosures. They never supplemented

1 their Rule 26 disclosures at any time. They
2 never identified in the response to
3 interrogatory answers.

4 And secondly because plaintiff had
5 other witnesses who they did properly identify
6 who could testify about the very same topics of
7 which they proposed Mr. Harrison to testify, and
8 they have these two witnesses who are Mr. Lennox
9 and Ms. Tan on their witness list.

10 THE COURT: If I recall correctly,
11 part of the issue here seemed to be that there
12 were things that you all elicited from the other
13 two witnesses that you wanted the opportunity to
14 use at trial. Is that part of the issue here?

15 MR. GRIMM: I don't know if that's
16 part of the issue or not, Your Honor. We
17 certainly plan to cross-examine those witnesses
18 when they're called at trial.

19 THE COURT: Those two witnesses I
20 think testified as 30(b)(6) witnesses?

21 MR. GRIMM: That's correct, Your
22 Honor.

23 THE COURT: Do you have any
24 concern, is this implicated at all in this

1 dispute, do you have any concern that you would
2 be able to use that testimony at trial for
3 purposes even if I let them call this witness,
4 Harrison?

5 MR. GRIMM: Well, if they call
6 Lennox and Tan, certainly we can cross-examine
7 them and that won't be a concern. That concern
8 won't be there. But it doesn't resolve the
9 issue over the prejudice to us of being
10 confronted with a new witness who was never
11 properly identified.

12 And I think what's important here,
13 Your Honor, is they propose for him to testify
14 about broad topics that other witnesses can
15 testify about. It's not like they're presenting
16 unique evidence that only his personal knowledge
17 is necessary. It's not as if a new issue arose
18 in this case towards the end of the scheduling
19 period that caused them to say oh, my gosh, we
20 need to respond to this and only Mr. Harrison
21 has the information to do that.

22 THE COURT: Thank you. Let me
23 give the plaintiffs a chance to respond.

24 MR. ALTHERR: I have some slides

1 on this, Your Honor.

2 THE COURT: All right. Well,
3 then, maybe we should put this off.

4 MR. ALTHERR: It's just one slide.

5 THE COURT: Let's see if we can do
6 it quickly.

7 MR. ALTHERR: Your Honor,
8 Mr. Harrison was made known to them.

9 THE COURT: His name appears but
10 you never disclosed him as someone having
11 information, did you?

12 MR. ALTHERR: Yes, we did, Your
13 Honor, in depositions.

14 THE COURT: But you didn't list
15 him in your specific disclosure, right, you
16 implicitly disclosed him.

17 MR. ALTHERR: We did not list him
18 on our rule -- our initial information
19 disclosures. We didn't list him on that. I
20 don't recall any deposition where they asked to
21 list the witnesses who were going to testify at
22 trial, any interrogatory. Mr. Harrison was
23 selected, he was one of ten custodians --

24 THE COURT: Put all that aside.

1 Why do you need him at this point?

2 MR. ALTHERR: As the 30(b)(6)
3 witnesses indicated, they had to go to him to
4 get particular information and consulted with
5 him where he had firsthand information about
6 things that they did not. And they were
7 relaying what Mr. Harrison had advised them.
8 Mr. Harrison talked about general corporate
9 background in his --

10 THE COURT: But you all put up
11 where you did on 30(b)(6), those statements are
12 binding on the plaintiff, those are coming in at
13 trial; correct?

14 MR. ALTHERR: They're binding on
15 plaintiff to the extent that they want to use
16 him, they can come in. As far as what we have
17 to say, if Ms. Tan is up there and said well,
18 Mr. Harrison told me this, I'm sure I'm going to
19 get an objection from them.

20 THE COURT: Is that what you're
21 trying to avoid?

22 MR. ALTHERR: I want to avoid
23 that. I want to be able to discern documents
24 that he had input into to be able to explain his

1 input into those documents, and also he was a
2 specific source of factual information for
3 Mr. Jarosz's opinions.

4 They were told multiple times, in
5 the 30(b)(6) deposition he was consulted, he was
6 told in several of Mr. Lennox's declarations
7 that were filed in this case that Mr. Harrison
8 was mentioned, in the Jarosz reports he's
9 mentioned in those as providing the factual
10 information --

11 THE COURT: Okay. We're going to
12 need to move on.

13 Mr. Grimm, briefly do you want to
14 respond?

15 MR. GRIMM: Can I respond from
16 here, Your Honor?

17 THE COURT: Sure.

18 MR. GRIMM: The fact that these
19 witnesses consulted Mr. Harrison to testify on
20 30(b)(6) indicates just how broad these topics
21 are and those witnesses can testify about the
22 sale.

23 THE COURT: What about the hearsay
24 concern, when he puts them on and they want to

1 say here is how I learned things, you all are
2 going to object.

3 MR. GRIMM: I seriously doubt that
4 it's going to come up how did you learn about
5 this, because it's going to be questions like
6 tell us about your marketing strategy, tell us
7 about the effect of Adherus competition -- he
8 has not identified anything that Mr. Harrison
9 was a percipient witness about that would draw
10 that kind of objection, Your Honor, so I don't
11 think that's really an issue.

12 The fact that he was mentioned in
13 expert reports or in documents that were
14 produced, that's certainly not the test for a
15 fair disclosure, Your Honor, otherwise something
16 could show up at trial and put anybody from
17 their company on the witness list.

18 THE COURT: I'll give it some more
19 thought. If I need more help, I will give you a
20 chance. But I will see you all at two o'clock.

21 (A brief recess was taken.)

22 THE COURT: Good afternoon.
23 Mr. Altherr. Did you have something you wanted
24 to say?

1 MR. ALTHERR: Your Honor, you
2 wanted me to report back about the depositions.

3 THE COURT: Come to the podium.
4 Thank you.

5 MR. ALTHERR: The deposition is of
6 just Dr. Mettler, and it is by video conference.
7 The IT people from our firm had coordinated with
8 the IT people from the Cooley firm to set up the
9 video link. They're testing it today at 3:00
10 p.m. in Germany to make sure it works. There is
11 a videographer and court reporter who had been
12 set up. This is exactly how we deposed
13 HyperBranch's witness Dr. Hartlage from the
14 United Kingdom earlier in the case. It's
15 supposed to start at three o'clock tomorrow.

16 Dr. Mettler is up in her
17 seventies, but I have talked with Mr. Shaw, he's
18 assured me she is in good enough health we could
19 put this off for six to eight weeks. I have
20 talked to counsel on the other side. They have
21 indicated to me that would be acceptable to them
22 if that would be agreeable to Your Honor, we
23 could depose Dr. Mettler in six to eight weeks.

24 THE COURT: If the parties have an

1 agreement to do that, that's fine by me. Do we
2 have an agreement on that point?

3 MR. GRAVES: Yes, Your Honor.

4 THE COURT: That's fine. You'll
5 reschedule for six to eight weeks or
6 thereabouts. What about the other witness that
7 the defendant thought was scheduled for
8 tomorrow?

9 MR. ALTHERR: The other witness
10 has not been scheduled, Your Honor.

11 THE COURT: Has not been
12 scheduled?

13 MR. ALTHERR: They have contact
14 problems getting in touch with that witness. If
15 we could get contact, like I said, we could set
16 that up in the six to eight weeks, but the
17 witness is in Germany, too, so it's been
18 difficult.

19 THE COURT: All right. Are the
20 defendants comfortable with the idea that that
21 one, too, would happen in six to eight weeks if
22 we could have contact with the person?

23 MR. GRAVES: That would be fine,
24 Your Honor, if we could get logistics and

1 contact information ahead of time.

2 THE COURT: Thank you for working
3 that issue out. When I left we sort of rushed
4 through Mr. Harrison. If either of you want to
5 say anything more on that, you certainly can.
6 Mr. Grimm, anything further on that?

7 MR. GRIMM: No, I don't think so,
8 Your Honor, unless you have a question.

9 THE COURT: No, I don't.

10 Anything further on Mr. Harrison?

11 MR. ALTHERR: The only thing is
12 this, I don't think the defendants should be
13 able to have it both ways. If they exclude this
14 witness, they shouldn't be able to object to our
15 30(b)(6) witness when they say they found out
16 something from Mr. Harrison.

17 THE COURT: I mean, do you
18 reasonably anticipate that you're going to be
19 asking questions of the nature of did you find
20 this out from Mr. Harrison?

21 MR. ALTHERR: Yes, there are
22 certain things that Mr. Harrison did on the
23 investigation on his own and they had to get the
24 information from him.

1 THE COURT: Maybe you could give
2 me an example because I didn't understand there
3 was any unique noncumulative evidence that
4 Mr. Harrison would have that these other two
5 witnesses wouldn't have.

6 MR. ALTHERR: Mr. Harrison was
7 directly involved in the acquisition from
8 Covidien of Confluent and obtaining the rights
9 to the patent for one thing. He was also
10 directly involved in preparing certain documents
11 that are used for the basis for both the expert
12 and Mr. Jarosz. And also we introduced exhibits
13 at the deposition of Mr. Lennox where
14 Mr. Harrison was the one who put those
15 documents, who helped put those documents
16 together and had personal knowledge of the
17 information going into them.

18 THE COURT: Okay. Thank you.
19 Mr. Grimm, some of that sounded new to me. Do
20 you want to respond to it?

21 MR. GRIMM: I'm not sure I got
22 every one of the points that Mr. Altherr was
23 trying to make. But first with respect to the
24 acquisition of Confluent, I haven't heard

1 anything that's unique to his knowledge that
2 he's going to testify. If it's just that we
3 acquired Confluent and the licenses that came
4 with it, it seems to me that that's corporate
5 knowledge that these other witnesses could
6 testify about.

7 And, in fact, Eva Tan did testify
8 as a 30(b)(6) witness about the acquisition of
9 Confluent. So apparently they thought she was
10 adequate for that purpose because they put her
11 up as their designee.

12 Mr. Altherr said that Mr. Harrison
13 prepared documents that were used by the
14 experts. As Your Honor knows, that's very
15 common, and the person preparing the documents
16 doesn't come testify. The expert, if it's
17 something that an expert can reasonably rely
18 upon under the rule, then he can refer to those
19 documents. So I haven't heard why it's
20 necessary for Mr. Harrison to talk about those
21 documents at trial.

22 THE COURT: Do you think I am to
23 apply the Pennypack factors to this dispute?

24 MR. GRIMM: Yes, Your Honor.

1 THE COURT: And have you all been
2 surprised and prejudiced in a material way by
3 this late disclosure?

4 MR. GRIMM: I think so. You know,
5 any time -- trial is all about strategy, and you
6 base your strategy based upon the disclosures
7 from the other side. They had every opportunity
8 to disclose this individual. He has been head
9 of their marketing -- he has a higher position
10 than that -- from the beginning of this case.
11 They didn't put him on their Rule 26
12 disclosures. It's very easy to supplement Rule
13 26 disclosures. They didn't use him as a
14 corporate designee, so it does come as a
15 surprise to us.

16 And often times when there is a
17 critical witness that comes forward at the last
18 moment, the court will permit the other side,
19 would be us in this case, to take a deposition
20 to try to cure any prejudice towards us, because
21 the prejudice to the plaintiff in that instance
22 would be quite high to preclude them because
23 it's a critical witness with a critical piece of
24 evidence that's come to light late in the day.

1 That's not what we have here.

2 It's not prejudice to them because it's
3 cumulative, and it is a surprise to us. Could
4 we take the deposition? Sure, we could take the
5 deposition. Given the lengthy topics that they
6 have given us, it might take more than a day for
7 that deposition. We're less than two weeks from
8 trial in a complicated case with several patents
9 and it's kind of the last thing we want to be
10 doing with our time. I think the Pennypack
11 factors do favor preclusion in this instance.

12 THE COURT: Thank you.

13 Mr. Altherr, anything further on
14 this?

15 MR. ALTHERR: Your Honor, with
16 regard to Pennypack factors, they do have time
17 to depose Mr. Harrison. All right? He's going
18 to testify for probably on direct for less than
19 half hour. The areas that he went, he said that
20 it was a surprise to them. Eva Tan specifically
21 indicated when she was testifying she went to
22 Mr. Harrison with regard to a number of things
23 with due diligence to acquire the patent and
24 acquire Confluent and the patents-in-suit.

1 As far as the point that he made
2 about experts, the expert I understand can rely
3 upon hearsay and go ahead and hear these things
4 out. However, all the points, laying foundation
5 for documents and things of this sort that come
6 into evidence, and that he should be able to
7 have him do that, the particular ones that he
8 contributed to. He is named as one of the ten
9 custodians identified for ESI, lots and lots of
10 documents that came out of his record produced
11 in this case.

12 THE COURT: I'm still struggling
13 with why you didn't just bother putting him in
14 your disclosure at some point.

15 MR. ALTHERR: We didn't update the
16 disclosures initially, and he had been -- like I
17 say, he had been identified on the depositions,
18 in the document production to us. This case is
19 a whole lot like the Delaware case that we cite,
20 the International Business Machines versus
21 Priceline that they were put on notice through
22 document production, organization charts,
23 testimony of two deponents, that we had more
24 than that, there was numerous declarations that

1 they refer to Mr. Harrison and the other
2 reports.

3 THE COURT: Okay. Mr. Grimm,
4 anything else?

5 MR. GRIMM: I'm sorry to belabor
6 this, if the test was whether somebody's name
7 appears in documents or in the declaration,
8 there would really be no test. They could bring
9 any employee of Integra to trial without a prior
10 disclosure.

11 And on the prejudice point, it has
12 always struck me as a bit odd that the way to
13 cure the prejudice is to make the party that
14 didn't cause the prejudice do more work. I
15 think in this particular case where there is
16 really no prejudice to the plaintiffs, that the
17 fact that we are prejudiced by going through the
18 effort to have to depose this fellow outweighs
19 any of the Pennypack factors.

20 THE COURT: Thank you. Bear with
21 me.

22 All right. I honestly forget at
23 this moment who raised this issue, but I am
24 going to strike Mr. Harrison from the

1 plaintiff's witness list. It's undisputed that
2 he was not identified in the plaintiff's Rule
3 26(a) disclosures, at no point was he expressly
4 disclosed.

5 The plaintiffs contend that
6 Mr. Harrison could have been identified and
7 known to the defendants given references to him
8 in depositions and the fact that he was a
9 custodian, he searched for and produced
10 documents, he was referenced in expert reports,
11 all of that is true, but I still think in the
12 context of this case the failure to identify him
13 at any point expressly as someone who had
14 relevant information and might be a witness at
15 trial did have the result that where we are now
16 means allowing him to testify would be a
17 surprise, a genuine surprise to the defendants.
18 It would be a little bit prejudicial to them in
19 that they didn't have time to think through when
20 and how they wanted to depose him and then deal
21 with whatever information they learned in the
22 deposition and formulate their strategy on that
23 basis.

24 I could cure some if not all of

1 the prejudice by allowing the deposition now,
2 but we are within two weeks of trial and you
3 have a lot of other things to do, but I think
4 most fundamentally I'm really not persuaded that
5 this is prejudicial to the plaintiffs. The
6 plaintiff designated who they designated as
7 their 30(b)(6) witnesses, the witnesses gave
8 testimony that was appropriate under 30(b)(6).
9 The plaintiff says the direct at best would be
10 about a half an hour and it sounds like it's on
11 topics that the 30(b)(6) witnesses have already
12 testified to and are presumed qualified to
13 testify to at trial.

14 The defendant is not going to make
15 any unreasonable objections to that testimony.
16 And I just don't think when I weigh all of that
17 that it is proper at this last minute to allow
18 Mr. Harrison to be added to the witness list.

19 I don't find bad faith, but I'm
20 still scratching my head as to why the plaintiff
21 didn't just bother to expressly identify the
22 witness.

23 Now, I do understand this dispute
24 occurred a month or more ago, so I understand

1 it's not fair to just say we're within two weeks
2 of trial and that's too late. The plaintiff
3 made efforts and letters were written to me a
4 month or two ago, and I recognize that, but I
5 still think weighing all the factors I'm not
6 going to allow him to testify.

7 Any questions about that?
8 Plaintiff?

9 MR. ALTHERR: No, Your Honor.

10 THE COURT: Any questions?

11 MR. GRIMM: No, Your Honor.

12 THE COURT: So did anybody
13 formulate any view on whether I should go ahead
14 and make decisions on the issues related to
15 claim 10 of the '034 patent now that it has been
16 severed and stayed? We have argued a number of
17 issues. There are various issues outstanding.
18 Do you have a view as to whether or not I should
19 resolve those issues? I guess first from the
20 defendant.

21 MR. GRAVES: Thank you, Your
22 Honor. With respect to the defendants, pending
23 objections to the magistrate judge's report and
24 recommendation, we're comfortable holding that

1 in abeyance without having it decided at this
2 point. We've resolved the German doctor
3 deposition issue as you just heard. We don't
4 think there is any point in the Court addressing
5 anything pending with respect to claim 10 at
6 this point.

7 THE COURT: The arguments about
8 testimony being inconsistent with the claim
9 construction, did any of that relate to claim
10 10? I simply don't remember.

11 MR. PIVOVAR: I believe it's all
12 related to the predetermined thickness.

13 THE COURT: Well, I ruled on the
14 predetermined thickness. I'm talking about your
15 objections to what the plaintiffs wanted to
16 present which I did not rule on.

17 MR. PIVOVAR: Actually, I think
18 they might all -- I would have to go back and
19 confirm, I think they might all apply to claim
20 10.

21 THE COURT: To the extent they
22 relate to claim 10, do you have a view as to
23 whether I should not rule on that?

24 MR. GRAVES: I don't recall that

1 there was anything unique to claim 10 in that
2 request of ours. In other words, I recall the
3 biocompatible hydrogel composition issue, but I
4 don't think we raised anything unique to claim
5 10.

6 THE COURT: Even if I were to rule
7 on claim 10, I still have to rule on it because
8 of its impact on other claims that are going to
9 trial; correct?

10 MR. GRAVES: Correct.

11 THE COURT: But with respect to
12 the objections to the R&R which had to do with
13 the recommendation for the finding of
14 infringement and also the indefiniteness issue,
15 I believe the defendant's view is I need not
16 rule on that at this time.

17 MR. GRAVES: I think it's
18 discretionary on your part, Your Honor. We're
19 not urging a ruling on that at this time. We're
20 comfortable with all of the claim 10 issues
21 being held in abeyance, including the scope of
22 IPR estoppel, if any, given the unique situation
23 we're in right now.

24 THE COURT: Okay. Do the

1 plaintiffs have a view?

2 MR. IWANICKI: Good afternoon,
3 Your Honor.

4 THE COURT: Good afternoon.

5 MR. IWANICKI: Our view is that we
6 think that you should respectfully if you were
7 so inclined to see the benefit of overruling the
8 objections and adopt the Court recommendation on
9 summary judgment because it would make a more
10 efficient trial. For example, with respect to
11 claim 10 and with respect to claim 20, we know
12 we identified that they differ in view of the
13 predetermined thickness, the observable change
14 limitation and the predetermined thickness
15 limitation, but they do share a common
16 limitations. Both share the visualization
17 agent. Both share crosslinking after contact
18 with tissue to form a hydrogel. Both share
19 electrophilic functional groups and nucleophilic
20 functional groups. And both share hydrogel
21 forming within a certain period of time after
22 contact with a substrate.

23 And if Your Honor were to overrule
24 the objections and adopt the magistrate judge's

1 recommendation, we would be able to use that to
2 sort of limit the presentation at trial with
3 respect to infringement of claim 20 because as a
4 matter of law those features would have already
5 been found in the accused products. We would
6 encourage Your Honor to move forward on that.

7 With respect to the issue of claim
8 10 being severed and stayed, with respect to the
9 inconsistent claim issues -- I'm sorry, with
10 respect to the opinions to be offered and they
11 rely on inconsistent claim constructions, we
12 still have on our side, we had the ones that
13 were related to the predetermined thickness
14 claims, of course, and there was one that
15 related to claim 10 being indefinite. Now that
16 claim 10 is out, I would think that that -- that
17 issue would be off the table with respect to any
18 inconsistent testimony offered with respect to
19 claim 10 being indefinite because there is going
20 to be no invalidity position presented at trial
21 with respect to claim 10 because it's been
22 severed and stayed.

23 And to the extent that they don't
24 bring up any invalidity of claim 10, of course

1 the positions on -- from Dr. Mays with respect
2 to that rebutting to those invalidity positions,
3 those would be anticipated by Rhee 500, Jacobs
4 obvious over Rhee, obvious over Rhee 500, and
5 Bass obvious over Rhee, those rebuttal opinions
6 would not be at play during the trial.

7 So I think you had asked the
8 question with respect to the portions of the
9 rebuttal reports, Mays' rebuttal report and the
10 other rebuttal report that they have identified
11 that may present issues with respect to
12 inconsistent -- opinions inconsistent with the
13 Court's claim construction. I think all of
14 those did relate to claim 10 and
15 biocompatibility. Some were related to the
16 5,705 patent in Dr. Mays' rebuttal report, they
17 had a whole swath of things with respect to the
18 5,705, but that's out -- but the remainder I
19 believe related to claim 10 of the '034 patent.
20 And now that that's out, there isn't anything in
21 those rebuttal reports that should be sort of
22 stricken because the testimony is going to be
23 presumptive. Did that make sense, Your Honor?

24 THE COURT: I'm thinking of it

1 more on the arguments for whether certain
2 evidence or opinions are inconsistent with the
3 Court's claim construction. Of course thinking
4 there were a bunch that the plaintiff raised and
5 there were a bunch that the defendants raised.

6 MR. IWANICKI: Yes.

7 THE COURT: I had thought I had
8 ruled on all the ones that you had raised but
9 for this indefiniteness of claim 10 issue. So I
10 had understood I was done with ruling on your
11 issues, but with respect to the defendant's
12 issues, I have taken that under advisement and
13 wanted to know to what extent my decision to
14 sever claim 10 impacted that. And what I'm
15 hearing the defendant say is it doesn't really
16 impact as much because most, if not all, of
17 those issues come up with connection with other
18 asserted claims that are going forth in trial.

19 MR. IWANICKI: I don't think
20 that's the case, Your Honor.

21 THE COURT: I'm going to need more
22 help from you on understanding exactly what it
23 is that the defendants think you're doing
24 inconsistent with the claim construction. So

1 you're all going to have a chance to meet and
2 confer and help straighten me out on that. But
3 I understand your position.

4 MR. IWANICKI: Thank you, Your
5 Honor.

6 THE COURT: All right. With
7 respect, the defendants would respond to, you
8 know, claim 20 is going forward, and there is
9 this argument that I should as I understand it
10 now, their position is I should not hold in
11 abeyance my review of Judge Burke's report on
12 claim 10 because in part it would help you all
13 with respect to how this trial is going to look
14 for claim 20. So do the defendants disagree
15 with that?

16 MR. PIVOVAR: Your Honor, so there
17 is overlapping language, but I don't know that
18 it makes any -- I don't know that it's going to
19 be material for you to have to resolve anything
20 with respect to claim 10 to reach any dispute
21 claim issues with respect to claim 20. Claim 20
22 does have a form a hydrogel within 60 seconds.
23 I don't know that there is any dispute between
24 the prior art meeting that limitation or the

1 contested aspect of how they presented the case
2 depending on how the Court would construe what a
3 gel time is or a fully cured hydrogel, that's
4 one aspect.

5 THE COURT: Doesn't that already
6 suggest I should just go ahead and rule on the
7 objections to Judge Burke's report because among
8 other things he construes that disputed claim
9 term that seems like it's pertinent to what you
10 just said?

11 MR. PIVOVAR: That's the one issue
12 that's actually presented that might actually be
13 helpful moving forward.

14 THE COURT: Okay. All right.
15 Well, with respect to whether the plaintiffs are
16 offering any opinion or evidence inconsistent
17 with the plaintiff's claim construction, I'm
18 trying to refer back to the discussion I had
19 this morning. As I suggested, I need some
20 additional help. At this point it's not clear
21 to me what exactly it is that the defendants are
22 saying is inconsistent with the claim
23 construction and where I can find it. So I
24 don't know. I don't have what I need yet to

1 give you a decision. I need some further
2 briefing.

3 Here is what I'm going to need.
4 We're going to have letter brief due on
5 Thursday, Friday and Saturday of this week. So
6 by Thursday, no more than five page single space
7 letter brief from the defendant where you
8 identify for me the exact opinions, not just
9 paragraph numbers, but the exact opinions which
10 as I understand it Rivot, DiStefano and/or Mays
11 that you are alleging are inconsistent with the
12 Court's construction of the suitable to coat the
13 tissue of patient term, and/or the biocompatible
14 composition term. And explain again if you
15 would at that time how it is that in your view
16 those opinions and that evidence is inconsistent
17 with the Court's construction.

18 The plaintiffs can respond the
19 next day, Friday, with their five-page single
20 space letter. And then the defendant on
21 Saturday can file a reply up to three pages,
22 single space letter brief. And hopefully at
23 that point I'll have what I need in connection
24 with the pending objections and the motions in

1 limine all of which touch on these issues of
2 trying to make sure everybody stays within the
3 scope of the claim construction in the evidence
4 and the opinion that they present at trial.

5 I'm not yet ready to rule on
6 whether -- on whether I'm going to rule or if
7 I'm going to rule what the ruling is in the
8 review of that R&R related to claim 10 of the
9 '034 patent. I think that I have what I need or
10 at least will once I also see the submissions
11 coming that I just ordered. If I need something
12 further from you all in order to rule on that,
13 if I decide to rule on it, I will let you know.

14 The other issue that has been
15 argued -- and also, make sure to attach those
16 expert reports as the defendants do that, any of
17 the expert reports that have any portion that
18 you're challenging as inconsistent with the
19 Court's construction, please go ahead and give
20 us the expert reports as well.

21 I think the only other thing that
22 you have argued that I haven't decided is the
23 plaintiff's motion for reconsideration of a
24 portion of my motion in limine ruling. That

1 motion is granted in part and denied in part.
2 What do I mean? I already granted the first
3 part of it which had to do with part of it in
4 Mr. Jarosz, the defendants said they didn't
5 object to the plaintiff introducing. I'm also
6 granting it with respect to the other portion of
7 the Jarosz opinion that is on the reasonable
8 royalty paid on sales in the United States. So
9 Mr. Jarosz will be permitted to testify to that
10 opinion.

11 I have considered the Pennypack
12 factors and I have decided ultimately they do
13 not favor excluding this opinion. In my view
14 the defendant is not truly surprised or
15 particularly prejudiced by what the defendant --
16 I'm sorry, the plaintiff intends to do through
17 Mr. Jarosz. His opinion was essentially
18 disclosed in the August 2017 report. That
19 portion of the report was not ever stricken.

20 The defendant may be a little bit
21 surprised that the plaintiffs are relying on
22 those reasonable royalty opinions, but I find
23 that they are not unfairly prejudiced. They
24 have an opportunity, I think maybe more than one

1 to depose Mr. Jarosz, of course they will be
2 able to cross-examine him at trial and his
3 opinions will be limited to what has been
4 adequately disclosed.

5 I will acknowledge it was not
6 entirely clear from the November 2017 report
7 that the plaintiffs were going to do what they
8 now have made clear they're going do with
9 Mr. Jarosz. I still find that the opinion was
10 itself disclosed and it was not ever
11 specifically withdrawn by Mr. Jarosz.

12 I think allowing it will not
13 obstruct the orderly and efficient progress of
14 the trial. I don't see any bad faith by the
15 plaintiffs. Clearly this should have been
16 clear, but in context I don't think the fact
17 that they weren't clear enough or the fact that
18 they argued the motion in limine the way they
19 did is not enough overall for me to strike that
20 opinion now that I understand what the
21 plaintiffs are seeking to do.

22 And also very importantly, this is
23 important evidence. It goes directly to the
24 damages that the plaintiffs are seeking to

1 recover. So I'm granting reconsideration with
2 respect to Jarosz, however, I'm denying it with
3 respect to DiStefano.

4 The plaintiff's only response in
5 the motion in limine to the request that
6 DiStefano be precluded as an infringement expert
7 was to argue that the 5,705 patent was still in
8 play because the court did not rule on
9 objections to Judge Burke's R&R granting summary
10 judgment of noninfringement of the 5,705 patent.

11 In fact, at the time that you all
12 submitted the pretrial order, I had already
13 adopted that report recommendation, I think it
14 was about August 6 about a month before the
15 parties submitted the pretrial order. In any
16 event, even if that were not the case, the
17 plaintiffs made no mention of any other reason
18 that DiStefano was still relevant in response to
19 the defendant's motion, so we had no opportunity
20 to consider any other issue at the time we were
21 deciding the motion in limine. It wasn't until
22 yesterday in the reconsideration motion that any
23 other argument was even made for why DiStefano
24 would still be relevant.

1 I don't think that it is crucially
2 important testimony from what I understand
3 because Dr. Mays is going to be the testifying
4 expert and he'll be permitted to say that he
5 relied on and reviewed materials that were
6 provided through Dr. DiStefano. So the motion
7 is denied with respect to DiStefano.

8 Any questions about any of that?

9 MR. IWANICKI: No Your Honor.

10 THE COURT: Any questions?

11 MR. CRENSHAW: Your Honor, just
12 very briefly, Mr. Jarosz's reasonable royalty
13 opinion in the United States, is that an
14 alternative request or is it cumulative to price
15 erosion because that's a bit of clarity I'm
16 still lacking?

17 THE COURT: That doesn't sound
18 like the question is directed to me. I don't
19 know if you can get some clarity from the
20 plaintiff.

21 MR. ALTHERR: Your Honor, it's
22 cumulative just like it was in his original
23 report.

24 MR. CRENSHAW: Your Honor, if you

1 remember in his original report, the footnote
2 said in the event lost profits are not awarded.
3 Here they haven't claimed lost profits, they
4 claimed price erosion, so we understood it was
5 an alternative request and they're trying to
6 shoehorn it in as a cumulative request. This is
7 the root of our problem. We'll accept Your
8 Honor's rule, we just want to seek --

9 THE COURT: You heard what the
10 plaintiff intends to do and all I can say beyond
11 that is when they show you their slides for what
12 they propose to do with the witness, if you
13 think that you have an objection that you can
14 make based on everything that has happened
15 through now and through then, go ahead and make
16 it. I certainly don't mean to be deciding that
17 particular issue, I'm just granting the
18 reconsideration and not at this time striking
19 that portion of Jarosz' testimony.

20 MR. CRENSHAW: Thank you, Your
21 Honor.

22 THE COURT: All right. Well,
23 let's talk about the pretrial order and then
24 I'll see if you have other issues.

1 So as an initial matter, if the
2 parties did not identify a dispute on a
3 particular issue in this pretrial order and I
4 have not addressed it either in writing or
5 today, we don't talk about it the rest of today,
6 then what you had proposed at that point,
7 jointly proposed is acceptable to the Court and
8 is hereby adopted and will govern unless there
9 is some modification of the order going forward.

10 With respect to uncontested facts,
11 either side may read some or all of those to the
12 jury provided that you give notice to the other
13 side that you're going to do so. And you will
14 be charged time for the time it takes you to
15 read those to the jury.

16 In terms of the factual issues to
17 be tried and the legal issues to be tried, I
18 think at this point subject to rulings that I
19 have taken under advisement, we're probably
20 hopefully in agreement as to what the subject of
21 this trial is going to be factually. And with
22 respect to any legal disputes I will handle
23 those in connection with resolving any disputed
24 jury instructions which we will talk about

1 further during trial.

2 Do the plaintiffs feel they know
3 what the issues are going to be factually at
4 trial or do you need something further from me?

5 MR. ALTHERR: No, Your Honor, we
6 think we know.

7 THE COURT: And defendant?

8 MR. GRAVES: We're fine, Your
9 Honor. We understand.

10 THE COURT: Okay. All right. In
11 terms of exhibits, exhibits that are on the
12 exhibit list and not objected to on the exhibit
13 list are received into evidence by operation of
14 the pretrial order. Once the exhibit is shown
15 to a witness and offered into evidence and the
16 Court will say at some point that it is
17 admitted. What that means is for an exhibit
18 that's not objected to in the pretrial order,
19 you don't need to lay a foundation. There won't
20 be any objections at trial to their admission.
21 But I do require that you take at least a moment
22 in the presence of the jury to show the exhibit
23 to a witness.

24 You'll have disclosed to one

1 another what exhibits it is that you intend to
2 use on direct. You have the timing in the
3 pretrial order for when you will identify
4 objections to admission of those exhibits. The
5 time to raise any objections that you have not
6 resolved to the admission of those exhibits is
7 in the morning before the jury comes in on the
8 day that you reasonably anticipate that witness
9 will be called to the stand.

10 If you don't raise those
11 objections with me in the morning of the
12 particular day, then the objections are waived
13 and you should not try to raise them later in
14 the day when the witness is on the stand.

15 When we discuss those objections
16 outside the presence of the jury, I'm going to
17 charge time to each party as they are speaking.
18 So if it's your objection, you'll be charged for
19 the time it takes you to argue your objection.
20 If it's the other side's objection, you'll only
21 be charged for the time it takes you to argue
22 your part. Whatever time it takes me to explain
23 my decision we'll split 50/50.

24 Even though we will have resolved

1 all of those objections before the jury comes
2 in, at some point during the direct examination
3 of the witness you do have to formally offer the
4 exhibit into evidence. You can either do it as
5 you show it to the witness or once at the end if
6 you want by the witness, but for the clarity of
7 the record, you need to offer into admission
8 exhibit number and whatever it is. And for
9 clarity of the record, I will ask the other side
10 whether they object even though we all know that
11 you can't object because I have already ruled on
12 the objections. When you say you do not object,
13 it is not giving up the fact that you may have
14 objected earlier in the day. You reserved your
15 rights by objecting earlier in the day.

16 Before you rest your case, I
17 suggest you check with my deputy to make sure
18 that we have noted in our records the admission
19 of everything that you think has been admitted
20 into evidence.

21 Any questions about how we're
22 going to handle the exhibits from the
23 plaintiffs?

24 MR. ALTHERR: No, Your Honor.

1 THE COURT: And from defendants?

2 MR. GRAVES: No, Your Honor.

3 THE COURT: Okay. In terms of
4 witnesses, you're going to call various
5 witnesses by deposition. We have the process
6 set out in the pretrial order as I mentioned a
7 little bit for narrowing the designations and
8 objections and giving me any disputes in time
9 for me to resolve before you call that witness.

10 If you intend to include a running
11 transcript at the bottom of the deposition, if
12 you're showing a video of the deposition to the
13 witness, you do need to disclose to the other
14 side that you intend to show a running
15 transcript so when you are providing your final
16 designations that you're going to use let the
17 other side know so if there is any objection to
18 the use of a running transcript that you all can
19 meet and confer on that and we don't get
20 surprised once the video starts playing.

21 In terms of objections to expert
22 testimony, as you requested, I will rule on
23 those objections at trial. For that one type of
24 objection, we will charge all of the time to the

1 party that does not prevail. So if it's an
2 objection that an expert witness is testifying
3 beyond the scope of what has previously been
4 disclosed, whoever prevails on that objection
5 will not be charged any time, and whoever
6 loses on that objection will be charged for both
7 sides' argument as well as the time it takes me
8 to make my decision.

9 Since I'm ruling on these at
10 trial, it's important for you to understand I
11 have not and will not memorize all of your
12 expert reports. I don't know what's in all of
13 them. So if you anticipate, as it sounds like
14 you probably should, any objections to your
15 expert that you're putting on, make sure you
16 come to court with extra copies of all the
17 expert reports, all the declarations, all the
18 deposition testimony, anything that you may rely
19 on when the other side says this has not been
20 fairly disclosed, you'll need be able to produce
21 to me a copy of it, at least two copies so that
22 when you tell me exactly where to find that it
23 has been disclosed, I can take a look and make a
24 decision for you.

1 In general, we limit examination
2 to direct, cross, and redirect without
3 recross-examination. If you want leave to
4 approach a witness, you need to ask for it.
5 Once per witness. Once you have asked for leave
6 to approach the witness, you can freely approach
7 that witness for the remainder of your
8 examination.

9 And I encourage you to make
10 transition statements. That's often helpful to
11 the jury. These are just brief non
12 argumentative statements. You can do it right
13 before you call a witness or even after you have
14 called them but before you start examining them
15 just to give a very brief sense to the jury of
16 where we are in the case and who this person is,
17 how they fit in.

18 Any questions about witnesses from
19 the plaintiffs?

20 MR. ALTHERR: No, Your Honor.

21 THE COURT: From defendant?

22 MR. GRAVES: No, Your Honor.

23 THE COURT: Okay. There was an
24 issue or maybe not a dispute, but a request

1 about closing the courtroom for portions of
2 certain witness testimony. First let me ask,
3 was there a dispute on that or just something
4 you wanted to flag for me that you anticipate
5 being necessary?

6 MR. ALTHERR: I don't believe
7 there is a dispute, Your Honor. I think they
8 may be wanting it closed more than we do, but
9 there are certain times we would like to have it
10 closed, particularly when they're talking
11 financial information.

12 THE COURT: Do you believe there
13 is a dispute on this at this point?

14 MR. GRAVES: I don't believe so,
15 Your Honor. I'm not sure we're going to request
16 closure more than they will, but I don't think
17 we have a dispute.

18 THE COURT: In terms of general
19 parameters, the more notice you can give me as
20 to which witnesses and roughly which time of
21 day, the better. We have a lot going on in the
22 building and it helps me to be able to have at
23 least one of the security officers here to help
24 manage the opening and closing of the courtroom.

1 We try to do it as little as necessary so to the
2 extent you possibly can, if you can segregate
3 the portions of your examination that you are
4 hoping happen in the sealed courtroom so we
5 don't have to open and close the courtroom once
6 per witness or at worse once per direct and once
7 per cross, that would be very helpful.

8 And, of course, you'll have to
9 make a record when the time comes as to what the
10 proper basis is for asking me to close the
11 courtroom.

12 Any questions about that?

13 MR. ALTHERR: No, Your Honor.

14 THE COURT: Any questions?

15 MR. GRAVES: No, Your Honor.

16 THE COURT: All right. So the
17 trial is going to be timed as you have seen in
18 the order. I think that fifteen hours per side
19 is adequate. I'm willing to hear an argument
20 for up to eighteen hours per side. Does either
21 side want to argue for something more than
22 fifteen hours? First from the plaintiffs.

23 MR. ALTHERR: Yes, Your Honor. We
24 would like to get the eighteen hours. We

1 understand that you have cut down quite a bit
2 here taking claim 10 out, but I still think
3 fifteen hours will be too few. The witnesses
4 listed, there is more than thirty for
5 plaintiffs, and I had thirty-five or thirty-six
6 for defendant. There is overlap on those, and
7 of course some of them, Jacobs will not be
8 testifying, but we need a little bit more time
9 than fifteen hours.

10 THE COURT: What's the defendant's
11 view?

12 MR. GRAVES: Well, with claim 10
13 out, Your Honor, we're a lot more comfortable
14 with fifteen than we were yesterday. I think
15 it's doable, but we don't oppose or request a
16 request for more, we think fifteen would be
17 doable, but another hour or two probably would
18 be helpful.

19 THE COURT: Let's do this. I'm
20 not expecting your positions to change, but I
21 want to give you overnight because a lot has
22 happened here today. It's at least possible in
23 my mind that you might decide with claim 10 gone
24 and the other decision that, eighteen, maybe

1 we're only asking for seventeen or sixteen, I
2 doubt you're going to ask for fifteen, but just
3 meet and confer on that. Give it a little bit
4 more thought. And I'll give you until Thursday.
5 Just send me a letter and tell me what your
6 updated requests are. If you want to put in any
7 argument, feel free, but it should be brief.

8 Any questions about that?

9 MR. ALTHERR: No, Your Honor.

10 MR. GRAVES: No, Your Honor.

11 THE COURT: I think this much is
12 clear, but pretty much, I mean, someone will be
13 charged for time when I'm in the courtroom with
14 very limited exceptions, so the whole jury
15 selection process, nobody is being charged for
16 that. When I read preliminary instructions or
17 final instructions, nobody is being charged for
18 that. When we have a prayer conference to
19 discuss the remaining disputes and final jury
20 instructions, no one will be charged for that.
21 But other than that, I can't think of anything else
22 that will happen during trial when I am on the
23 bench that someone won't be charged. So
24 obviously your openings, your closings, your

1 examination of witnesses, arguments over those
2 objections that we talked about, arguments if
3 there are any over motions for judgment as a
4 matter of law, somebody is being charged for all
5 of that.

6 When you play depositions, you'll
7 need to give us the percentage breakdown per
8 side. And we charge all the time it takes to
9 play that deposition, we split that time up
10 according to the percentages that you give.

11 Obviously if I think anybody is
12 abusing the other side, for instance,
13 interrupting somebody's non objectionable
14 examination by just constantly objecting and
15 dragging out the time it takes to finish that
16 examination, I reserve the right to shift time
17 or take time away or give additional time to the
18 other side. I don't expect any of that to
19 happen, but I do have the discretion to do that.

20 Any questions about any of that,
21 how we're going to keep track of the time?

22 MR. ALTHERR: No, Your Honor.

23 MR. GRAVES: No, Your Honor.

24 THE COURT: All right. Jury

1 selection, just an overview as to how we do
2 this. On the voir dire I will get that docketed
3 by the morning of jury selection. I need all of
4 you to be here 8:30 that first day, but whatever
5 times I put on the schedule are for you to be
6 here. The jury pool is not here until 9:30 on
7 that first day, so we have time to talk about
8 any remaining issues that need to be discussed.

9 Once the jury pool is available,
10 they will be seated in the back of the courtroom
11 across all those benches. I will read out loud
12 to them the various voir dire questions. They
13 will all be in the form of yes or no questions.
14 I don't make the jurors stand up or raise their
15 hand or say anything in response to me reading
16 the questions from the bench. After I have read
17 them all, we will meet individually either at
18 the side-bar or in my jury room with each
19 potential juror that acknowledges to my staff
20 that in their mind they answered yes to at least
21 one of the questions.

22 Once we bring that juror in, I
23 will try to explore with them what they answered
24 yes to and then each side will have a chance for

1 brief follow-up if necessary to figure out
2 better what that the juror was concerned with
3 and wanted us to know. Once the juror leaves
4 our presence, I'll see if either side has a
5 motion to strike the juror for cause, and then
6 we'll move on to the next one.

7 Once we finish all of that, we'll
8 make sure we are on the same page as to who is
9 left in the jury pool and we will randomly draw
10 fourteen potential jurors. We'll seat them in
11 the jury box and each side will have three
12 preemptory strikes.

13 The way we exercise those strikes
14 is through the silent passing of the clipboard
15 back and forth from plaintiff to defendant.
16 You'll each note who you are striking and we'll
17 take turns and we will remove the six that have
18 been struck. We'll have a jury of eight. I
19 don't treat any as alternates, so if eight are
20 here or seven are here when the case is ready
21 for deliberation, all eight or all seven will be
22 part of the jury.

23 Any questions about jury?

24 MR. ALTHERR: No, Your Honor.

1 MR. GRAVES: No, Your Honor.

2 THE COURT: All right. In terms
3 of the final jury instructions, I will need you
4 to submit another version in light of some of
5 the rulings I have already made and there may be
6 some additional rulings coming. As of now --
7 and we can revisit this when we start trial, but
8 as of now for getting me a revised form of final
9 instructions by that first Thursday of trial,
10 because we'll need time to review them and plan
11 a time to discuss with you any remaining
12 disputes.

13 I think I can work with the voir
14 dire and preliminary instructions that you have
15 already submitted even though there has been
16 some changes with what's at issue in the case.
17 If I need some further assistance from you, I'll
18 let you know.

19 Any questions about that?

20 MR. ALTHERR: No, Your Honor.

21 MR. GRAVES: No, Your Honor.

22 THE COURT: All right. Any issues
23 that the plaintiff wanted to raise that I
24 haven't gotten to?

1 MR. ALTHERR: Can I confer?

2 THE COURT: Sure. Take your time.

3 MR. ALTHERR: If I may, Your
4 Honor, this is just one issue that relates to
5 the use of depositions of HyperBranch's 30(b)(6)
6 witnesses and their officers who by making
7 admissions are making admissions on behalf of
8 the party. So they're party admissions which we
9 plan to introduce some in our case in chief.

10 I understand that the deposition
11 designations on those should have enough of what
12 they want to put in for completeness, but they
13 should not be able to put their whole case
14 through and our case in chief with all the
15 designations they want. I wanted to ask you how
16 you rule on that, Your Honor.

17 THE COURT: So you're concerned
18 that when you tell them here is our specific
19 designations of the 30(b)(6) that we want to
20 play, that they will counter-designate more than
21 is necessary and you'll be forced to play it
22 during your case in chief, that's the concern?

23 MR. ALTHERR: Yes, Your Honor.

24 THE COURT: Okay. Do defendants

1 want to address that?

2 MR. GRAVES: Each of those
3 witnesses will be coming to Wilmington to
4 testify live. If they don't want to call a
5 witness live, they want to do a 30(b)(6)
6 deposition clip, that's fine. We just want the
7 ability to provide reasonable
8 counter-designations for context and clarity.

9 We intend to call each of those
10 three witnesses live in our case in chief so we
11 have no interest in filling up a deposition
12 designation clip with their testimony ad
13 nauseam.

14 THE COURT: Okay. Mr. Altherr,
15 I'm not sure I can do more than just be alerted
16 to the issue that you have raised because there
17 is the process whereby you'll specifically
18 designate what it is you want to use trial time
19 for and they'll counter-designate and you'll
20 meet and confer. I'll get a chance to give it
21 thought in that specific context. If there is
22 something more you think I can do more than
23 that, given what we have just heard, feel free
24 to come back. Is there more that I can do for

1 you on that?

2 MR. ALTHERR: No, Your Honor,
3 reasonable counter-designations should not be a
4 problem.

5 THE COURT: Any other issue
6 plaintiff want to raise?

7 MR. ALTHERR: No, Your Honor.

8 THE COURT: How about defendants?

9 MR. GRAVES: One issue, again, on
10 live witnesses, the fact witnesses on the
11 plaintiff's list, Integra employees, they're
12 designated as being called live if they're
13 coming at all. We have issued trial subpoenas
14 to those four witnesses because we would like to
15 call each of them in our case in chief, Ms. Tan,
16 Mr. Lenox, Dr. Bennett and Dr. Sawhney. I
17 understand from talking to Mr. Altherr that
18 their present intention is to call each of those
19 witnesses during their case in chief and he's
20 going to talk to the witnesses about their
21 speculative schedule and planning to work
22 together to try to minimize inconvenience to the
23 witnesses, but I wasn't sure if the Court had
24 any preference in terms of someone is called

1 live by the plaintiffs, should we take care of
2 their entire examination at that time or just
3 cross on the scope and direct and call the
4 witness back in our case in chief.

5 THE COURT: So my first preference
6 is that you all work it out. So if you do work
7 it out either by calling them multiple times or
8 just doing it once, I can't imagine I will have
9 a problem with it. If you don't work it out,
10 then I would just ask that you bring the dispute
11 to me as soon as you can so that I can have
12 whatever I need in order to resolve it.

13 MR. GRAVES: That's fine. Our
14 main concern is making sure these four people
15 are in Wilmington to testify live. And I
16 believe that's going to be the case from
17 Mr. Altherr.

18 THE COURT: Is there any doubt
19 about that, or that's --

20 MR. ALTHERR: No. I have
21 contacted all the witnesses and we expect them
22 here at least sometime.

23 THE COURT: Okay. If you see an
24 issue that emerges, you'll just have to let me

1 know.

2 Anything else from defendant.

3 MR. GRAVES: No, Your Honor.

4 THE COURT: Okay. Just a few tiny
5 little last remarks from me. If you do have
6 submissions after the trial day or on weekends,
7 and I think also we have the holiday, Memorial
8 Day around your trial, please make sure to email
9 our chamber's email address. If you don't have
10 that, Mr. Looby can get it to you, but make sure
11 to serve a courtesy copy on us through that
12 chamber email address to make sure we don't
13 overlook anything. That was all I have.

14 Nothing else from plaintiff?

15 MR. ALTHERR: Nothing else, Your
16 Honor.

17 THE COURT: Nothing else from
18 defendant?

19 MR. GRAVES: No, Your Honor.

20 THE COURT: Thank you all very
21 much. We'll be in recess.

22 (Court recessed at 3:00 p.m.)
23
24

1 State of Delaware)
2)
3 New Castle County)
4

5 CERTIFICATE OF REPORTER
6

7 I, Dale C. Hawkins, Registered Merit
8 Reporter, Certified Shorthand Reporter, and Notary
9 Public, do hereby certify that the foregoing record,
10 is a true and accurate transcript of my stenographic
11 notes taken on May 15, 2018, in the above-captioned
12 matter.
13

14 IN WITNESS WHEREOF, I have hereunto set my
15 hand and seal this 16th day of May 2018, at
16 Wilmington.
17

18
19 /s/ Dale C. Hawkins

20 Dale C. Hawkins, RMR
21
22
23
24

\$	<div></div> <div>15-819-LPS-CJB [1] - 1:8</div> <div>16th [1] - 212:15</div> <div>1930 [1] - 83:13</div>	107:6, 109:1, 181:16, 181:18, 189:7, 189:10 50/50 [1] - 194:23 500 [5] - 74:5, 74:15, 88:15, 181:3, 181:4 541 [1] - 105:5
'	2	6
'034 [21] - 4:13, 4:20, 7:19, 72:21, 79:2, 80:15, 81:24, 83:20, 87:12, 87:15, 88:6, 89:2, 115:24, 131:21, 136:16, 137:10, 137:16, 145:21, 176:15, 181:19, 186:9 '34 [1] - 71:5 '418 [1] - 82:6 '566 [5] - 66:10, 82:5, 83:20, 145:21, 146:1	20 [15] - 72:3, 72:4, 72:14, 72:21, 73:1, 73:4, 73:8, 81:23, 145:3, 179:11, 180:3, 183:8, 183:14, 183:21 2017 [4] - 112:9, 112:24, 187:18, 188:6 2018 [3] - 1:13, 212:11, 212:15 2020 [1] - 78:23 22 [5] - 110:19, 111:7, 114:3, 115:1, 115:3 23 [2] - 111:20, 115:17 24th [4] - 101:17, 103:15, 114:22, 115:6 25th [15] - 100:3, 101:4, 102:13, 104:10, 104:15, 110:11, 110:12, 110:13, 110:24, 111:17, 112:9, 113:14, 113:17, 113:19, 113:20 26 [7] - 156:13, 157:5, 158:19, 158:24, 159:1, 170:11, 170:13 26(a) [1] - 174:3 260 [1] - 105:5 27 [2] - 156:14, 157:6 28 [2] - 83:11, 110:19 29 [1] - 132:18 29th [2] - 3:23, 89:17	6 [1] - 189:14 60 [1] - 183:22 6B [1] - 1:14 6th [2] - 75:22, 80:10
/		7
/s [1] - 212:19		7,964,217 [1] - 126:15 <div></div>
0		8
0.96 [1] - 125:9		844 [1] - 1:15 8:30 [1] - 204:4 8:38 [1] - 1:13
1		9
1 [3] - 66:7, 66:10 <div></div> <div>1.1 [1] - 128:21</div> <div>1.47 [1] - 125:9</div> <div>10 [98] - 4:13, 4:20, 7:17, 7:19, 51:15, 51:22, 53:12, 54:4, 55:6, 56:21, 57:7, 58:6, 60:12, 66:8, 71:4, 71:14, 72:2, 72:7, 72:14, 72:22, 73:9, 73:15, 73:21, 74:4, 76:1, 76:19, 76:22, 77:2, 77:8, 77:21, 78:1, 78:11, 79:2, 81:13, 81:17, 83:18, 87:15, 88:6, 89:7, 90:22, 91:4, 92:17, 93:21, 95:7, 95:10, 95:15, 95:21, 96:10, 115:24, 117:24, 119:2, 131:20, 132:21, 133:2, 133:10, 134:5, 134:7, 134:21, 136:1, 136:16, 137:10, 137:16, 137:23, 137:24, 138:8, 142:19, 143:4, 144:18, 145:20, 145:22, 150:21, 176:15, 177:5, 177:10, 177:20, 177:22, 178:1, 178:5, 178:7, 178:20, 179:11, 180:8, 180:15, 180:16, 180:19, 180:21, 180:24, 181:14, 181:19, 182:9, 182:14, 183:12, 183:20, 186:8, 201:2, 201:12, 201:23</div> <div>100 [2] - 101:23, 115:12</div> <div>112 [18] - 26:19, 29:24, 41:15, 50:12, 147:12, 147:15, 148:3, 148:5, 148:13, 149:18, 150:6, 150:7, 151:7, 151:11, 151:20, 152:23, 154:5, 155:12</div> <div>1338 [1] - 83:11</div> <div>15 [2] - 1:13, 212:11</div>	3 <div>3 [2] - 114:24, 115:15</div> <div>3,705 [6] - 99:6, 99:8, 107:21, 108:9, 146:19, 146:21</div> <div>3.26 [1] - 128:20</div> <div>30(b)(6) [12] - 159:20, 162:2, 162:11, 163:5, 163:20, 167:15, 169:8, 175:7, 175:11, 207:5, 207:19, 208:5</div> <div>30(b)(6) [1] - 175:8</div> <div>315 [2] - 84:12, 88:9</div> <div>315(e)(2) [2] - 82:21, 139:3</div> <div>315(e)(2) [1] - 83:4</div> <div>318(a) [1] - 83:7</div> <div>337 [1] - 83:13</div> <div>37 [1] - 115:17</div> <div>3:00 [2] - 165:9, 211:22</div>	94 [1] - 105:5 9:30 [1] - 204:6
	3	A
		a.m [1] - 1:13 abeyance [3] - 177:1, 178:21, 183:11 ability [1] - 208:7 able [36] - 10:17, 20:20, 31:21, 37:15, 37:18, 38:9, 53:16, 61:12, 74:17, 88:5, 94:10, 99:24, 103:8, 103:10, 105:3, 105:21, 109:20, 114:5, 128:4, 138:24, 141:5, 144:7, 144:10, 153:3, 155:9, 160:2, 162:23, 162:24, 167:13, 167:14, 172:6, 180:1, 188:2, 197:20, 199:22, 207:13 above-captioned [1] - 212:11 absolutely [2] - 11:21, 150:12 abusing [1] - 203:12 accept [1] - 191:7 acceptable [2] - 165:21, 192:7 accepted [1] - 129:19 according [6] - 17:18, 112:8, 118:7, 123:1, 126:2, 203:10 account [1] - 45:5 accounted [1] - 104:18 accurate [1] - 212:10 accusation [3] - 44:20, 74:10, 75:12 accused [14] - 10:21, 11:13, 19:13,
	4	
	4 [1] - 145:24 4.5 [1] - 129:2	
	5	
	5 [1] - 145:21 5 705 [10] - 98:22 99:3 99:5 99:11	

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<p>31:15, 45:11, 86:12, 102:9, 107:16, 107:19, 112:22, 117:12, 121:19, 125:2, 180:5</p> <p>accuses [2] - 48:2, 48:5</p> <p>accusing [1] - 32:5</p> <p>achieve [1] - 28:20</p> <p>achieved [2] - 30:15, 44:20</p> <p>acknowledge [1] - 188:5</p> <p>acknowledges [1] - 204:19</p> <p>acquire [2] - 171:23, 171:24</p> <p>acquired [1] - 169:3</p> <p>acquisition [3] - 168:7, 168:24, 169:8</p> <p>Act [1] - 83:13</p> <p>act [1] - 86:4</p> <p>action [2] - 80:8, 83:10</p> <p>actual [4] - 13:9, 45:9, 123:5, 152:22</p> <p>ad [1] - 208:12</p> <p>ADAM [1] - 2:15</p> <p>Adam [1] - 3:17</p> <p>add [5] - 42:16, 62:5, 63:8, 81:1, 127:24</p> <p>added [6] - 9:20, 28:11, 28:13, 68:12, 68:16, 175:18</p> <p>adding [1] - 38:3</p> <p>addition [5] - 28:1, 82:16, 103:23, 104:6, 104:22</p> <p>additional [8] - 9:20, 36:5, 56:1, 65:24, 129:4, 184:20, 203:17, 206:6</p> <p>additionally [3] - 81:22, 82:16, 87:22</p> <p>address [6] - 6:2, 146:13, 157:22, 208:1, 211:9, 211:12</p> <p>addressed [5] - 99:15, 107:13, 141:16, 142:20, 192:4</p> <p>addressing [2] - 45:22, 177:4</p> <p>adequate [4] - 35:14, 114:8, 169:10, 200:19</p> <p>adequately [2] - 156:5, 188:4</p> <p>adhere [1] - 69:8</p> <p>adherence [2] - 62:2, 62:11</p> <p>Adherus [4] - 113:1, 125:6, 125:11, 164:7</p> <p>adjudicated [2] - 97:7, 133:4</p> <p>administer [1] - 140:19</p> <p>admission [5] - 193:20, 194:4, 194:6, 195:7, 195:18</p> <p>admissions [3] - 207:7, 207:8</p> <p>admit [2] - 4:8, 65:18</p> <p>admits [1] - 65:17</p> <p>admitted [2] - 193:17, 195:19</p> <p>adopt [6] - 55:19, 109:12, 126:23, 133:1, 179:8, 179:24</p> <p>adopted [4] - 65:22, 77:15, 189:13, 192:8</p> <p>adopting [2] - 56:12, 133:11</p> <p>adopts [2] - 77:9, 80:16</p> <p>advance [2] - 49:8, 49:11</p> <p>advancing [1] - 52:11</p> <p>adverse [1] - 6:11</p> <p>advised [2] - 79:18, 162:7</p> <p>advisement [2] - 182:12, 192:19</p>	<p>affect [1] - 69:14</p> <p>affirmed [1] - 136:12</p> <p>affirming [1] - 134:23</p> <p>afoul [1] - 150:6</p> <p>afternoon [3] - 164:22, 179:2, 179:4</p> <p>afterwards [1] - 157:22</p> <p>aged [4] - 138:24, 139:13, 141:6, 143:22</p> <p>agenda [2] - 3:24, 137:15</p> <p>agent [26] - 30:20, 32:24, 33:18, 34:13, 34:15, 34:19, 40:13, 58:8, 66:9, 66:11, 66:12, 66:15, 66:16, 66:18, 69:14, 69:15, 72:9, 81:5, 81:8, 81:13, 81:14, 149:2, 153:23, 153:24, 155:3, 179:17</p> <p>agents [1] - 13:17</p> <p>aggregate [16] - 53:5, 56:8, 57:19, 118:1, 118:3, 118:16, 121:9, 121:12, 124:23, 125:4, 125:15, 125:24, 126:17, 126:21, 127:15, 129:14</p> <p>aging [1] - 143:2</p> <p>ago [3] - 93:3, 175:24, 176:4</p> <p>agree [17] - 12:21, 15:22, 36:6, 36:13, 38:15, 42:22, 55:12, 55:19, 56:19, 57:4, 57:7, 57:23, 91:1, 117:8, 122:9, 137:4, 150:5</p> <p>agreeable [1] - 165:22</p> <p>agreed [1] - 60:17</p> <p>agreeing [1] - 75:17</p> <p>agreement [4] - 59:24, 166:1, 166:2, 192:20</p> <p>ahead [9] - 87:9, 87:17, 150:2, 167:1, 172:3, 176:13, 184:6, 186:19, 191:15</p> <p>AIA [2] - 74:16, 75:14</p> <p>air [3] - 33:14, 153:24, 154:1</p> <p>alerted [1] - 208:15</p> <p>allegations [1] - 19:12</p> <p>allege [1] - 57:22</p> <p>alleged [1] - 141:24</p> <p>alleging [1] - 185:11</p> <p>allocate [1] - 95:14</p> <p>allocation [1] - 76:5</p> <p>allow [9] - 77:13, 87:24, 88:16, 98:9, 100:9, 106:23, 133:22, 175:17, 176:6</p> <p>allowed [10] - 29:5, 29:7, 43:12, 46:23, 51:7, 88:19, 109:23, 110:9, 111:2, 156:4</p> <p>allowing [4] - 113:17, 174:16, 175:1, 188:12</p> <p>allows [1] - 125:12</p> <p>alluded [1] - 135:8</p> <p>almost [3] - 128:21, 134:3, 135:1</p> <p>alone [1] - 78:11</p> <p>alter [1] - 140:22</p> <p>alternates [1] - 43:24</p> <p>alternates [1] - 205:19</p> <p>alternative [5] - 13:2, 102:17, 136:14, 190:14, 191:5</p> <p>altherr [6] - 109:16, 140:1, 171:13, 208:14, 209:17, 210:17</p> <p>Altherr [5] - 3:10, 115:18, 164:23,</p>	<p>168:22, 169:12</p> <p>ALTHERR [90] - 2:6, 5:9, 28:16, 80:1, 80:22, 81:11, 83:2, 84:2, 84:18, 84:23, 85:24, 87:7, 89:1, 89:8, 89:11, 90:16, 91:3, 92:5, 92:19, 92:24, 93:4, 93:9, 93:19, 94:2, 94:12, 106:17, 106:24, 109:18, 110:18, 111:8, 111:15, 111:24, 113:7, 113:13, 114:2, 124:12, 125:19, 126:11, 127:5, 127:13, 127:23, 131:4, 138:21, 139:17, 141:2, 144:4, 144:12, 145:15, 146:2, 146:8, 146:20, 156:15, 157:7, 158:4, 160:24, 161:4, 161:7, 161:12, 161:17, 162:2, 162:14, 162:22, 165:1, 165:5, 166:9, 166:13, 167:11, 167:21, 168:6, 171:15, 172:15, 176:9, 190:21, 193:5, 195:24, 198:20, 199:6, 200:13, 200:23, 202:9, 203:22, 205:24, 206:20, 207:1, 207:3, 207:23, 209:2, 209:7, 210:20, 211:15</p> <p>altherr's [1] - 95:1</p> <p>Amneal [1] - 85:4</p> <p>amount [8] - 86:5, 88:18, 91:15, 95:3, 118:15, 126:7, 128:5, 128:9</p> <p>amounts [1] - 120:19</p> <p>analysis [1] - 41:15</p> <p>answer [8] - 6:5, 21:7, 24:6, 24:8, 55:23, 95:24, 144:11, 144:14</p> <p>answered [2] - 204:20, 204:23</p> <p>answers [1] - 159:3</p> <p>anticipate [4] - 167:18, 194:8, 197:13, 199:4</p> <p>anticipated [2] - 85:18, 181:3</p> <p>anticipation [3] - 74:4, 150:9, 151:16</p> <p>anticipatory [2] - 141:24, 142:3</p> <p>anyway [1] - 81:7</p> <p>apologize [1] - 27:22</p> <p>appeal [12] - 54:22, 76:22, 86:18, 89:18, 92:10, 96:5, 96:6, 96:11, 96:13, 99:13, 136:12</p> <p>appeals [1] - 89:18</p> <p>appearance [1] - 142:12</p> <p>APPEARANCES [1] - 2:1</p> <p>appearances [1] - 3:3</p> <p>apple [1] - 86:3</p> <p>application [12] - 18:18, 21:15, 25:21, 29:9, 29:17, 30:18, 38:16, 52:1, 123:5, 123:19, 123:21, 123:23</p> <p>applications [3] - 18:24, 20:22, 31:11</p> <p>applicator [1] - 78:19</p> <p>applicators [1] - 94:16</p> <p>applied [13] - 6:22, 17:10, 18:17, 22:2, 47:20, 52:13, 53:14, 65:16, 65:21, 85:15, 120:8, 120:11, 121:13</p> <p>applies [4] - 29:8, 29:10, 30:14, 75:1</p> <p>apply [9] - 20:20, 28:18, 29:16, 65:1, 112:16, 112:20, 157:1, 169:23, 177:19</p> <p>applying [5] - 38:22, 38:23, 44:24, 84:12, 112:21</p> <p>apportioned [1] - 91:23</p>
--	--	---

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<p>apportionment [3] - 101:7, 101:12, 104:16</p> <p>approach [4] - 105:24, 198:4, 198:6</p> <p>appropriate [8] - 44:19, 52:17, 91:22, 124:5, 127:2, 138:14, 138:15, 175:8</p> <p>approved [1] - 91:17</p> <p>April [4] - 75:22, 80:10, 112:24, 132:15</p> <p>areas [2] - 58:20, 171:19</p> <p>argue [17] - 25:11, 25:23, 26:10, 41:13, 48:21, 49:17, 51:14, 58:10, 58:21, 63:15, 72:1, 80:13, 137:19, 189:7, 194:19, 194:21, 200:21</p> <p>argued [15] - 42:10, 47:8, 47:24, 60:14, 69:2, 77:16, 108:12, 131:15, 137:14, 137:18, 144:18, 176:16, 186:15, 186:22, 188:18</p> <p>argues [1] - 90:5</p> <p>arguing [13] - 11:2, 11:4, 22:24, 41:17, 42:16, 42:20, 66:17, 75:18, 76:24, 77:7, 99:4, 124:14, 126:9</p> <p>argument [39] - 5:18, 5:23, 9:19, 15:20, 22:14, 23:1, 23:12, 23:15, 24:12, 35:18, 43:19, 45:22, 46:8, 48:17, 49:18, 55:18, 67:23, 68:4, 69:21, 74:7, 87:1, 88:19, 98:20, 98:21, 108:13, 117:14, 122:12, 132:23, 133:16, 138:8, 141:20, 142:4, 150:6, 151:23, 183:9, 189:23, 197:7, 200:19, 202:7</p> <p>argumentative [1] - 198:12</p> <p>arguments [13] - 18:3, 19:23, 27:8, 45:21, 46:13, 58:7, 59:8, 149:8, 149:9, 177:7, 182:1, 203:1, 203:2</p> <p>arising [1] - 83:10</p> <p>Arizona [1] - 140:4</p> <p>arose [1] - 160:17</p> <p>arrangements [1] - 138:22</p> <p>arrived [1] - 64:13</p> <p>arriving [1] - 65:7</p> <p>ARSHT [1] - 2:11</p> <p>Arsht [1] - 3:13</p> <p>art [20] - 14:4, 35:15, 59:3, 59:9, 61:6, 61:14, 65:16, 67:16, 68:22, 69:6, 72:13, 74:13, 82:5, 82:18, 83:17, 88:20, 126:14, 147:22, 150:14, 183:24</p> <p>articulate [1] - 63:24</p> <p>articulated [2] - 27:10, 28:1</p> <p>articulation [1] - 39:16</p> <p>aside [3] - 87:3, 88:10, 161:24</p> <p>aspect [6] - 34:5, 54:1, 60:16, 63:2, 184:1, 184:4</p> <p>aspects [6] - 4:16, 8:24, 14:12, 32:15, 34:2, 61:24</p> <p>assemblies [1] - 78:20</p> <p>assert [6] - 74:11, 83:9, 89:3, 145:18, 146:17, 150:11</p> <p>asserted [7] - 72:13, 72:15, 72:18, 76:8, 148:17, 153:5, 182:18</p> <p>asserting [4] - 98:10, 142:2, 146:3, 146:5</p> <p>assess [1] - 128:4</p>	<p>assistance [1] - 206:17</p> <p>associates [1] - 119:24</p> <p>assumed [1] - 106:18</p> <p>assured [1] - 165:18</p> <p>attach [1] - 186:15</p> <p>attack [1] - 126:19</p> <p>attention [1] - 157:5</p> <p>August [21] - 100:3, 101:4, 102:13, 104:10, 104:13, 104:15, 110:11, 110:12, 110:13, 110:17, 110:23, 111:17, 112:9, 113:6, 113:7, 113:14, 113:17, 113:19, 113:20, 187:18, 189:14</p> <p>authority [2] - 74:18, 83:23</p> <p>automobile [1] - 35:5</p> <p>available [3] - 111:22, 115:4, 204:9</p> <p>avoid [4] - 40:23, 136:13, 162:21, 162:22</p> <p>award [1] - 92:13</p> <p>awarded [1] - 191:2</p> <p>aware [5] - 4:2, 31:5, 59:4, 74:20, 74:21</p>	<p>behalf [2] - 97:20, 207:7</p> <p>behind [2] - 78:22, 86:4</p> <p>belabor [1] - 173:5</p> <p>belief [1] - 133:19</p> <p>below [4] - 18:5, 20:10, 31:16, 31:20</p> <p>bench [4] - 78:3, 136:20, 202:23, 204:16</p> <p>benches [1] - 204:11</p> <p>benefit [2] - 109:9, 179:7</p> <p>Bennett [1] - 209:16</p> <p>best [5] - 8:6, 47:4, 51:10, 132:16, 175:9</p> <p>better [4] - 49:21, 109:13, 199:21, 205:2</p> <p>Betts [1] - 89:23</p> <p>between [11] - 6:8, 15:9, 25:16, 72:2, 103:8, 109:3, 121:6, 125:8, 128:5, 131:13, 183:23</p> <p>beyond [8] - 32:13, 32:14, 39:24, 49:15, 49:20, 148:11, 191:10, 197:3</p> <p>big [3] - 17:3, 17:6, 117:13</p> <p>bigger [1] - 123:17</p> <p>binding [2] - 162:12, 162:14</p> <p>biocompatibility [11] - 60:19, 61:18, 62:15, 62:22, 62:24, 63:22, 63:23, 67:23, 69:1, 98:21, 181:15</p> <p>biocompatible [43] - 59:10, 59:13, 59:18, 60:16, 60:21, 60:24, 61:2, 61:3, 61:4, 61:9, 61:10, 61:11, 61:23, 63:4, 63:5, 63:6, 63:7, 63:11, 64:4, 64:5, 64:9, 64:10, 64:15, 64:21, 65:4, 65:10, 65:14, 65:18, 65:19, 66:12, 66:16, 66:18, 66:22, 67:9, 67:19, 69:19, 69:22, 69:23, 70:12, 178:3, 185:13</p> <p>biodegradability [1] - 62:23</p> <p>biodegradable [1] - 99:11</p> <p>bit [12] - 16:23, 27:8, 82:22, 99:18, 173:12, 174:18, 187:20, 190:15, 196:7, 201:1, 201:8, 202:3</p> <p>bite [1] - 86:2</p> <p>bookend [1] - 56:18</p> <p>bother [2] - 172:13, 175:21</p> <p>bottom [3] - 92:1, 125:5, 196:11</p> <p>box [1] - 205:11</p> <p>brand [1] - 87:16</p> <p>brand-new [1] - 87:16</p> <p>break [8] - 93:16, 93:20, 131:11, 131:13, 137:17, 141:4, 144:15, 144:21</p> <p>breakdown [1] - 203:7</p> <p>brief [14] - 45:20, 80:13, 89:22, 119:19, 128:15, 131:7, 164:21, 185:4, 185:7, 185:22, 198:11, 198:15, 202:7, 205:1</p> <p>briefed [2] - 55:5, 122:5</p> <p>briefing [4] - 64:20, 75:2, 116:16, 185:2</p> <p>briefly [7] - 6:3, 44:5, 114:19, 115:22, 128:12, 163:13, 190:12</p> <p>bring [10] - 34:9, 36:9, 53:18, 106:8, 147:13, 173:8, 180:24, 204:22, 210:10</p> <p>bringing [3] - 12:16, 94:18, 152:24</p> <p>broad [2] - 160:14, 163:20</p> <p>broader [5] - 27:8, 43:15, 72:8, 81:18, 87:1</p> <p>broadly [1] - 77:6</p>
B		
<p>background [1] - 162:9</p> <p>backstop [1] - 149:19</p> <p>bad [2] - 175:19, 188:14</p> <p>baked [1] - 96:17</p> <p>balance [1] - 134:15</p> <p>Banner [1] - 3:9</p> <p>BANNER [1] - 2:5</p> <p>bar [1] - 204:18</p> <p>barium [11] - 60:6, 62:8, 63:2, 63:8, 66:3, 66:4, 66:17, 68:11, 68:15, 69:12, 70:9</p> <p>barred [1] - 75:8</p> <p>barrier [2] - 125:13, 125:14</p> <p>base [2] - 48:18, 170:6</p> <p>based [28] - 8:24, 12:17, 36:10, 38:10, 40:21, 41:4, 51:23, 53:1, 53:13, 76:20, 84:21, 91:15, 92:9, 92:13, 96:11, 97:3, 101:6, 104:16, 106:4, 112:13, 115:3, 142:11, 148:2, 148:7, 155:10, 170:6, 191:14</p> <p>bases [1] - 26:12</p> <p>basis [23] - 24:1, 25:12, 27:14, 27:16, 35:24, 36:24, 48:10, 48:12, 48:22, 49:2, 91:18, 91:24, 93:18, 95:15, 101:5, 107:10, 135:3, 139:9, 154:18, 158:2, 168:11, 174:23, 200:10</p> <p>Bass [1] - 181:5</p> <p>battled [1] - 94:20</p> <p>bear [2] - 70:17, 173:20</p> <p>become [1] - 7:3</p> <p>becomes [3] - 18:23, 43:7, 66:13</p> <p>BEFORE [1] - 1:18</p> <p>begin [1] - 3:23</p> <p>beginning [1] - 170:10</p>		

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<p>brought [2] - 67:24, 78:17 BTG [1] - 85:3 bubbles [3] - 33:15, 153:24, 154:1 build [1] - 67:13 building [3] - 123:16, 124:4, 199:22 bunch [2] - 182:4, 182:5 burden [1] - 152:22 Burke [24] - 6:21, 32:1, 32:17, 45:3, 53:6, 55:11, 55:19, 57:11, 57:23, 58:4, 65:2, 65:22, 71:14, 91:22, 116:7, 118:18, 120:3, 124:13, 124:22, 125:23, 128:1, 130:9, 136:22, 137:3 Burke's [5] - 126:19, 133:2, 183:11, 184:7, 189:9 business [1] - 143:11 Business [1] - 172:20 busy [2] - 3:23, 138:23 buying [1] - 136:10 BY [7] - 2:3, 2:6, 2:7, 2:11, 2:12, 2:14, 2:15</p>	<p>14:9, 14:22, 15:5, 15:8, 15:12, 15:13, 15:15, 15:18, 15:21, 15:23, 16:4, 16:19, 23:16, 23:20, 26:13, 36:11, 42:1, 149:2 categories [1] - 59:12 category [1] - 91:16 causation [1] - 32:24 caused [2] - 30:19, 160:19 causes [1] - 40:13 causing [3] - 33:15, 116:19, 149:2 certain [17] - 4:16, 6:13, 11:6, 21:22, 34:21, 38:8, 38:21, 47:18, 55:11, 57:8, 57:20, 167:22, 168:10, 179:21, 182:1, 199:2, 199:9 certainly [18] - 8:4, 11:4, 41:7, 73:13, 100:3, 103:14, 103:18, 131:24, 132:8, 134:10, 150:7, 155:15, 156:3, 159:17, 160:6, 164:14, 167:5, 191:16 CERTIFICATE [1] - 212:5 Certified [1] - 212:8 certify [1] - 212:9 challenging [2] - 7:13, 186:18 chamber [1] - 211:12 chamber's [1] - 211:9 chance [15] - 4:3, 58:18, 63:15, 90:23, 90:24, 94:23, 101:14, 105:17, 130:22, 143:13, 160:23, 164:20, 183:1, 204:24, 208:20 change [57] - 8:12, 8:15, 9:1, 9:6, 9:14, 10:12, 13:18, 14:9, 14:22, 15:5, 15:8, 15:13, 15:15, 15:18, 15:21, 15:23, 16:4, 16:19, 18:11, 18:14, 18:15, 18:20, 19:2, 19:6, 19:8, 20:6, 20:13, 23:8, 23:16, 23:20, 25:6, 25:21, 26:13, 28:21, 30:19, 31:13, 31:20, 33:1, 34:18, 34:19, 36:11, 38:11, 38:17, 39:1, 39:17, 40:14, 42:1, 45:10, 46:3, 122:11, 149:3, 154:9, 179:13, 201:20 changes [5] - 20:8, 20:9, 24:24, 33:15, 206:16 changing [2] - 21:21, 31:16 chapter [1] - 83:6 charge [3] - 194:17, 196:24, 203:8 charged [11] - 192:14, 194:18, 194:21, 197:5, 197:6, 202:13, 202:15, 202:17, 202:20, 202:23, 203:4 chart [1] - 125:10 charts [1] - 172:22 chassis [1] - 35:5 check [1] - 195:17 chemical [2] - 116:17, 116:18 chemistry [2] - 94:17, 118:22 chief [7] - 207:9, 207:14, 207:22, 208:10, 209:15, 209:19, 210:4 Chief [1] - 1:19 choice [1] - 103:17 chose [1] - 103:8 chosen [2] - 90:14, 158:14 CHRISTOPHER [1] - 2:7</p>	<p>Circuit [13] - 77:7, 87:8, 89:18, 91:1, 92:11, 95:8, 96:7, 96:11, 96:13, 96:21, 134:23, 136:17, 137:4 circular [1] - 69:21 circumstances [1] - 84:1 citations [2] - 62:17, 62:18 cite [2] - 74:17, 172:19 cited [4] - 82:18, 83:18, 89:22, 142:6 civil [1] - 83:9 claim [298] - 4:7, 4:10, 4:12, 4:20, 5:14, 5:19, 6:10, 6:18, 7:17, 7:19, 7:20, 9:11, 9:15, 9:21, 12:18, 14:3, 14:14, 14:19, 14:23, 15:17, 15:19, 16:9, 19:4, 20:20, 22:15, 27:13, 28:11, 28:23, 29:5, 29:19, 32:2, 32:8, 32:15, 33:5, 34:6, 35:1, 35:3, 35:10, 35:12, 35:16, 39:21, 40:22, 41:18, 42:2, 42:4, 42:7, 42:9, 42:13, 42:24, 43:11, 43:13, 43:15, 43:22, 44:17, 45:3, 47:15, 47:19, 48:4, 48:23, 49:18, 50:7, 50:17, 50:24, 51:15, 51:18, 51:22, 52:3, 52:4, 52:13, 52:17, 52:24, 53:10, 53:12, 53:16, 53:19, 54:4, 55:6, 55:13, 56:21, 57:7, 58:3, 58:4, 58:6, 58:11, 58:22, 59:7, 60:11, 60:12, 60:15, 61:6, 61:14, 61:15, 61:16, 63:10, 64:7, 64:18, 65:24, 66:7, 66:8, 66:10, 66:14, 66:19, 67:4, 67:7, 67:17, 69:3, 69:17, 69:19, 69:24, 70:4, 70:22, 71:4, 71:14, 71:17, 71:20, 71:23, 72:2, 72:3, 72:4, 72:5, 72:7, 72:14, 72:15, 72:21, 72:22, 73:1, 73:4, 73:5, 73:8, 73:9, 73:15, 73:21, 73:23, 74:2, 74:4, 75:17, 76:1, 76:4, 76:5, 76:7, 76:19, 76:22, 77:2, 77:8, 77:13, 77:18, 77:21, 77:23, 78:1, 78:7, 78:11, 79:2, 79:3, 79:15, 81:9, 81:12, 81:13, 81:17, 81:18, 81:23, 82:1, 82:8, 82:17, 83:5, 83:13, 83:18, 85:20, 86:13, 87:4, 87:15, 88:6, 89:6, 89:7, 90:22, 91:4, 91:13, 91:23, 92:17, 93:18, 93:21, 95:3, 95:7, 95:10, 95:15, 95:21, 96:10, 96:16, 97:4, 97:8, 103:19, 104:4, 109:2, 112:11, 115:24, 117:24, 119:2, 120:18, 121:12, 121:21, 124:18, 125:22, 126:2, 126:19, 126:23, 127:1, 128:2, 130:10, 131:20, 132:3, 132:6, 132:18, 132:21, 133:2, 133:10, 134:5, 134:7, 134:18, 134:21, 135:3, 135:14, 135:19, 136:1, 136:16, 137:10, 137:15, 137:23, 137:24, 138:8, 142:19, 143:3, 144:18, 145:8, 145:20, 145:21, 145:24, 147:14, 150:21, 151:10, 152:4, 152:6, 152:24, 155:1, 155:5, 155:10, 176:15, 177:5, 177:8, 177:9, 177:19, 177:22, 178:1, 178:4, 178:7, 178:20, 179:11, 180:3, 180:7, 180:9, 180:11, 180:15, 180:16, 180:19, 180:21, 180:24, 181:13, 181:14, 181:19, 182:3, 182:9, 182:14, 182:24, 183:8, 183:12,</p>
C		
<p>calculated [3] - 103:5, 112:7, 112:24 calculation [5] - 109:21, 111:16, 112:17, 112:18 calculations [2] - 104:19, 113:19 camp [1] - 6:13 cancel [1] - 144:1 cannot [5] - 13:24, 19:2, 88:11, 88:13, 88:14 captioned [1] - 212:11 care [1] - 210:1 carry [2] - 73:21, 110:10 case [97] - 25:1, 25:3, 26:24, 27:13, 28:6, 29:24, 30:1, 30:7, 30:8, 32:6, 59:5, 63:20, 64:17, 73:12, 73:20, 75:2, 75:20, 76:1, 77:14, 78:14, 78:18, 78:21, 78:22, 79:3, 80:3, 82:11, 83:18, 84:15, 85:4, 87:10, 88:21, 89:14, 89:23, 90:3, 94:11, 94:13, 94:14, 94:15, 94:18, 94:20, 95:13, 96:8, 96:13, 96:16, 98:23, 110:4, 111:2, 117:8, 122:9, 133:20, 133:24, 134:2, 134:11, 135:23, 136:21, 136:23, 137:7, 141:8, 141:14, 141:21, 145:22, 148:3, 148:4, 148:8, 150:20, 150:21, 150:22, 154:22, 155:17, 160:18, 163:7, 165:14, 170:10, 170:19, 171:8, 172:11, 172:18, 172:19, 173:15, 174:12, 182:20, 184:1, 189:16, 195:16, 198:16, 205:20, 206:16, 207:9, 207:13, 207:14, 207:22, 208:10, 209:15, 209:19, 210:4, 210:16 Case [1] - 1:7 cases [2] - 86:19, 114:9 Castle [1] - 212:2 catch [1] - 78:16 categorical [21] - 8:15, 10:12, 13:17,</p>	<p>Hawkins Reporting Service 715 North King Street - Wilmington, Delaware 19801 (302) 658-6697 EMAIL: Dalehrs@aol.com</p>	

<p>183:14, 183:20, 183:21, 184:8, 184:17, 184:22, 186:3, 186:8, 201:2, 201:12, 201:23</p> <p>claim-by-claim [2] - 91:23, 95:15</p> <p>claimed [3] - 14:1, 191:3, 191:4</p> <p>claiming [1] - 95:2</p> <p>claims [60] - 6:18, 9:17, 10:4, 11:14, 11:17, 12:15, 13:3, 13:13, 13:23, 15:4, 15:24, 25:3, 27:2, 28:2, 28:14, 29:21, 30:22, 34:2, 38:3, 38:15, 39:4, 39:5, 39:9, 39:10, 40:8, 40:10, 40:11, 42:18, 43:4, 43:5, 44:11, 50:9, 50:10, 54:8, 72:4, 72:7, 72:17, 72:19, 73:7, 76:8, 77:12, 79:14, 80:24, 81:1, 81:6, 91:14, 95:16, 133:7, 146:18, 148:12, 148:17, 148:20, 148:22, 149:24, 152:1, 152:3, 153:6, 178:8, 180:14, 182:18</p> <p>clarification [1] - 141:1</p> <p>clarity [9] - 47:4, 56:1, 100:14, 119:10, 190:15, 190:19, 195:6, 195:9, 208:8</p> <p>clear [17] - 8:10, 13:6, 36:1, 47:12, 69:5, 75:14, 86:9, 86:19, 86:21, 102:19, 114:7, 184:20, 188:6, 188:8, 188:16, 188:17, 202:12</p> <p>clearance [1] - 127:1</p> <p>clearly [7] - 47:6, 63:5, 87:23, 105:18, 107:5, 108:20, 188:15</p> <p>click [1] - 120:22</p> <p>clip [2] - 208:6, 208:12</p> <p>clipboard [1] - 205:14</p> <p>clock [2] - 54:11, 96:4</p> <p>close [3] - 143:10, 200:5, 200:10</p> <p>closed [2] - 199:8, 199:10</p> <p>closer [1] - 106:18</p> <p>closing [2] - 199:1, 199:24</p> <p>closings [1] - 202:24</p> <p>closure [1] - 199:16</p> <p>cloudier [1] - 19:4</p> <p>co [2] - 140:5, 141:3</p> <p>co-counsel [2] - 140:5, 141:3</p> <p>coat [2] - 63:19, 185:12</p> <p>coated [11] - 60:13, 61:22, 62:1, 62:10, 67:1, 67:8, 68:13, 68:17, 68:19, 68:23, 69:7</p> <p>cogent [1] - 80:11</p> <p>collagen [2] - 63:3, 70:9</p> <p>colleagues [1] - 3:16</p> <p>college [1] - 71:10</p> <p>color [71] - 8:16, 8:17, 10:12, 10:14, 10:16, 10:18, 11:6, 11:9, 11:10, 12:8, 12:11, 13:18, 14:1, 17:14, 17:16, 17:17, 18:11, 18:18, 18:19, 19:6, 20:3, 23:8, 23:17, 23:20, 23:23, 24:15, 24:23, 24:24, 25:7, 25:15, 26:13, 26:22, 28:14, 28:20, 29:9, 29:10, 29:18, 30:6, 30:14, 31:13, 36:12, 37:5, 37:9, 37:11, 37:12, 37:16, 37:19, 38:17, 38:20, 38:24, 39:14, 39:15, 42:2, 44:13, 45:13, 45:14, 45:18, 45:24, 46:3, 46:6, 46:8, 46:9, 46:11,</p>	<p>46:16, 51:8, 149:2, 156:19, 156:21</p> <p>colored [1] - 39:3</p> <p>colors [12] - 18:5, 20:21, 21:23, 22:2, 23:10, 25:8, 25:15, 28:24, 44:18, 44:22, 46:22</p> <p>combination [1] - 74:12</p> <p>comfortable [5] - 155:19, 166:20, 176:24, 178:20, 201:13</p> <p>coming [6] - 137:6, 162:12, 186:11, 206:6, 208:3, 209:13</p> <p>Commission [1] - 83:12</p> <p>commit [1] - 105:19</p> <p>common [5] - 82:17, 82:18, 82:19, 169:15, 179:15</p> <p>company [1] - 164:17</p> <p>compared [1] - 150:22</p> <p>compensate [1] - 114:9</p> <p>compensation [5] - 103:20, 104:3, 104:6, 105:8</p> <p>competition [1] - 164:7</p> <p>competitors [3] - 89:21, 90:2, 134:17</p> <p>compile [1] - 149:11</p> <p>complete [7] - 80:6, 89:14, 108:18, 125:17, 125:21, 127:12, 127:14</p> <p>completed [3] - 127:12, 127:16, 134:4</p> <p>completely [3] - 72:12, 72:16</p> <p>completeness [1] - 207:12</p> <p>complex [2] - 94:14, 94:21</p> <p>complexity [1] - 73:12</p> <p>complicate [1] - 73:11</p> <p>complicated [1] - 171:8</p> <p>complicating [1] - 94:18</p> <p>complications [1] - 133:3</p> <p>complied [1] - 150:16</p> <p>component [4] - 102:23, 115:7, 115:8, 115:14</p> <p>components [4] - 52:13, 101:9, 116:20, 118:8</p> <p>composition [15] - 52:22, 59:13, 59:19, 60:13, 60:22, 60:23, 61:4, 61:12, 65:14, 68:13, 68:17, 68:18, 69:22, 178:3, 185:14</p> <p>comprising [1] - 35:5</p> <p>computation [1] - 110:2</p> <p>CONAWAY [1] - 2:3</p> <p>Conaway [1] - 3:8</p> <p>concept [1] - 118:24</p> <p>concern [7] - 159:24, 160:1, 160:7, 163:24, 207:22, 210:14</p> <p>concerned [2] - 205:2, 207:17</p> <p>concerns [3] - 140:21, 146:11, 146:22</p> <p>concession [1] - 95:1</p> <p>concluded [1] - 41:7</p> <p>concludes [2] - 39:19, 39:22</p> <p>CONCLUENT [1] - 1:5</p> <p>conclusion [2] - 32:1, 132:19</p> <p>condition [1] - 153:20</p> <p>conditions [1] - 68:21</p> <p>conduct [1] - 78:3</p>	<p>conducted [1] - 128:19</p> <p>confer [8] - 76:11, 155:17, 157:1, 183:2, 196:19, 202:3, 207:1, 208:20</p> <p>conference [6] - 3:22, 80:11, 140:3, 140:16, 165:6, 202:18</p> <p>confident [1] - 93:7</p> <p>confirm [3] - 5:22, 96:21, 177:19</p> <p>conflating [1] - 124:15</p> <p>Confluent [5] - 168:8, 168:24, 169:3, 169:9, 171:24</p> <p>confront [2] - 74:19, 74:22</p> <p>confronted [1] - 160:10</p> <p>confronting [1] - 132:10</p> <p>confused [1] - 88:3</p> <p>connect [1] - 19:20</p> <p>connected [1] - 116:22</p> <p>connection [5] - 130:10, 156:12, 182:17, 185:23, 192:23</p> <p>connotations [1] - 129:24</p> <p>consider [3] - 91:7, 135:11, 189:20</p> <p>considered [4] - 80:2, 80:10, 132:20, 187:11</p> <p>considering [1] - 135:5</p> <p>consistent [4] - 7:20, 50:6, 109:2, 154:22</p> <p>constantly [1] - 203:14</p> <p>construction [71] - 4:7, 4:10, 5:14, 5:20, 6:11, 7:20, 11:23, 12:19, 19:5, 22:16, 27:13, 29:13, 32:8, 32:16, 32:22, 33:5, 39:21, 39:24, 41:19, 43:22, 47:15, 47:19, 48:5, 48:24, 49:19, 50:7, 50:18, 51:1, 51:19, 53:20, 58:12, 58:23, 59:7, 59:18, 63:11, 64:2, 64:4, 64:7, 64:14, 64:18, 65:7, 65:21, 65:24, 66:22, 67:4, 67:7, 67:17, 69:4, 70:22, 124:5, 126:3, 126:20, 126:23, 127:1, 128:2, 130:10, 130:15, 145:8, 152:4, 152:7, 155:2, 177:9, 181:13, 182:3, 182:24, 184:17, 184:23, 185:12, 185:17, 186:3, 186:19</p> <p>constructions [5] - 6:19, 38:17, 40:22, 155:11, 180:11</p> <p>construe [2] - 53:16, 184:2</p> <p>construed [11] - 9:18, 53:10, 63:18, 63:21, 63:23, 65:4, 69:17, 70:4, 70:6, 124:19, 155:3</p> <p>construes [1] - 184:8</p> <p>consulted [3] - 162:4, 163:5, 163:19</p> <p>contact [13] - 52:7, 52:9, 52:22, 53:3, 57:13, 140:7, 141:5, 166:13, 166:15, 166:22, 167:1, 179:17, 179:22</p> <p>contacted [1] - 210:21</p> <p>contend [2] - 107:24, 174:5</p> <p>content [1] - 145:1</p> <p>contest [4] - 65:15, 97:24, 98:3, 109:22</p> <p>contested [1] - 184:1</p> <p>contesting [1] - 113:18</p> <p>context [17] - 16:19, 16:23, 31:14, 50:10, 50:20, 64:11, 72:21, 119:2, 120:8, 127:7, 129:10, 130:6, 135:17, 174:12, 188:16, 208:8, 208:21</p>
---	--	--

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<p>continuation [1] - 83:21 continue [1] - 98:14 continued [2] - 39:12, 110:16 continues [1] - 111:21 continuously [1] - 31:15 contradicts [1] - 103:16 contrary [2] - 76:15, 108:4 contributed [1] - 172:8 controlled [2] - 17:23, 120:15 controlling [2] - 85:10, 120:20 COOLEY [1] - 2:14 Cooley [2] - 3:16, 165:8 Cooper [1] - 89:23 coordinated [1] - 165:7 copies [2] - 197:16, 197:21 copy [2] - 197:21, 211:11 cornucopia [1] - 45:11 CORP [1] - 1:4 Corp [1] - 89:22 corporate [3] - 162:8, 169:4, 170:14 correct [30] - 7:14, 8:20, 9:12, 9:22, 9:23, 11:18, 11:19, 13:1, 23:20, 23:21, 26:6, 55:7, 59:14, 59:15, 77:5, 80:21, 84:1, 108:12, 108:15, 113:6, 114:22, 126:3, 130:12, 137:9, 144:12, 158:4, 159:21, 162:13, 178:9, 178:10 correctly [5] - 28:4, 35:22, 41:13, 78:17, 159:10 correlate [1] - 46:9 correlated [2] - 19:7, 22:10 correlation [4] - 21:20, 22:1, 25:17, 46:7 costing [1] - 68:1 Counsel [2] - 2:8, 2:16 counsel [3] - 140:5, 141:3, 165:20 counter [5] - 45:21, 207:20, 208:8, 208:19, 209:3 counter-designate [2] - 207:20, 208:19 counter-designations [2] - 208:8, 209:3 County [1] - 212:2 couple [6] - 19:21, 19:23, 52:4, 132:1, 141:8, 156:9 course [9] - 4:3, 85:23, 90:24, 180:14, 180:24, 182:3, 188:1, 200:8, 201:7 court [16] - 74:19, 74:22, 78:12, 84:7, 84:11, 85:3, 85:13, 85:22, 132:10, 134:12, 140:3, 140:8, 165:11, 170:18, 189:8, 197:16 COURT [298] - 1:2, 3:1, 3:6, 3:11, 3:19, 5:10, 5:13, 6:4, 7:6, 7:21, 8:1, 8:18, 9:9, 9:14, 9:18, 10:2, 10:8, 10:20, 11:15, 12:2, 12:20, 14:6, 15:10, 15:22, 16:3, 16:13, 16:17, 17:5, 19:16, 19:22, 21:2, 21:8, 21:13, 22:12, 22:23, 23:4, 23:14, 23:22, 24:5, 24:11, 24:21, 25:10, 25:18, 25:23, 26:5, 26:8, 26:15, 26:21, 27:4, 27:9, 27:19, 27:24, 29:2, 29:22, 30:4, 31:3, 32:3, 34:9, 35:17, 35:21, 36:18, 36:22, 37:3, 37:24, 40:2, 40:24, 41:11, 41:21, 42:5, 42:14, 42:22, 43:18, 44:2, 44:7, 47:3, 47:11,</p>	<p>51:4, 51:9, 51:13, 53:21, 55:4, 55:10, 55:17, 56:11, 56:23, 57:3, 58:5, 58:17, 59:12, 59:16, 59:23, 60:3, 60:8, 63:14, 64:3, 66:2, 66:24, 68:8, 70:14, 70:17, 71:2, 71:12, 72:24, 74:17, 76:17, 78:13, 78:24, 79:7, 79:12, 79:17, 79:23, 80:19, 81:8, 83:1, 83:22, 84:16, 84:20, 85:13, 86:10, 86:20, 88:23, 89:5, 89:9, 90:11, 90:18, 92:1, 92:7, 92:22, 93:2, 93:6, 93:14, 93:23, 94:7, 94:22, 97:12, 98:5, 98:16, 99:18, 100:8, 100:18, 104:8, 104:24, 106:1, 106:13, 106:20, 107:3, 107:23, 108:10, 109:4, 109:15, 110:15, 111:5, 111:11, 111:18, 113:4, 113:8, 113:23, 114:18, 115:21, 116:11, 121:23, 122:14, 122:22, 124:7, 124:10, 125:16, 126:8, 127:3, 127:10, 127:18, 127:21, 128:10, 129:6, 130:8, 130:14, 130:21, 131:1, 131:5, 131:8, 138:18, 139:14, 139:21, 140:24, 141:15, 142:5, 142:8, 142:13, 142:22, 143:24, 144:6, 144:14, 145:9, 145:13, 145:16, 146:5, 146:10, 146:15, 146:22, 147:1, 147:8, 147:17, 147:23, 148:16, 149:12, 150:8, 151:2, 151:15, 151:19, 151:22, 153:4, 153:16, 154:20, 155:14, 156:23, 157:8, 157:11, 157:17, 157:24, 158:6, 159:10, 159:19, 159:23, 160:22, 161:2, 161:5, 161:9, 161:14, 161:24, 162:10, 162:20, 163:11, 163:17, 163:23, 164:18, 164:22, 165:3, 165:24, 166:4, 166:11, 166:19, 167:2, 167:9, 167:17, 168:1, 168:18, 169:22, 170:1, 171:12, 172:12, 173:3, 173:20, 176:10, 176:12, 177:7, 177:13, 177:21, 178:6, 178:11, 178:24, 179:4, 181:24, 182:7, 182:21, 183:6, 184:5, 184:14, 190:10, 190:17, 191:9, 191:22, 193:7, 193:10, 196:1, 196:3, 198:21, 198:23, 199:12, 199:18, 200:14, 200:16, 201:10, 201:19, 202:11, 203:24, 206:2, 206:22, 207:2, 207:17, 207:24, 208:14, 209:5, 209:8, 210:5, 210:18, 210:23, 211:4, 211:17, 211:20 Court [56] - 1:19, 6:10, 9:8, 12:1, 12:15, 14:14, 38:11, 38:12, 39:8, 39:10, 39:12, 39:19, 39:22, 41:7, 41:23, 42:10, 43:12, 52:16, 52:18, 53:10, 53:16, 54:11, 54:15, 54:16, 54:21, 59:6, 60:17, 60:22, 61:1, 61:17, 63:20, 63:23, 65:11, 69:17, 69:21, 70:5, 70:6, 77:8, 78:5, 80:9, 80:16, 91:6, 101:13, 114:14, 121:13, 124:15, 128:3, 155:2, 177:4, 179:8, 184:2, 192:7, 193:16, 209:23, 211:22 court's [1] - 50:17 Court's [30] - 4:10, 5:19, 7:20, 8:9, 12:18, 32:21, 39:21, 39:24, 41:18,</p>	<p>53:19, 59:18, 63:10, 70:22, 145:8, 150:16, 152:4, 152:6, 155:1, 155:10, 181:13, 182:3, 185:12, 185:17, 186:19 courtesy [1] - 211:11 courtroom [8] - 5:3, 199:1, 199:24, 200:4, 200:5, 200:11, 202:13, 204:10 Courtroom [1] - 1:14 courts [1] - 139:8 cover [1] - 131:12 covered [1] - 156:16 Covidien [1] - 168:8 creation [1] - 37:7 credible [1] - 102:24 credibly [1] - 101:15 CRENSHAW [25] - 2:15, 97:19, 98:8, 98:18, 99:23, 100:12, 100:21, 105:2, 106:6, 106:15, 114:20, 138:2, 139:23, 146:24, 147:19, 148:2, 148:21, 149:18, 150:12, 153:18, 157:16, 157:19, 190:11, 190:24, 191:20 Crenshaw [4] - 3:18, 75:3, 97:20, 143:14 critical [3] - 170:17, 170:23 cross [8] - 100:17, 140:11, 159:17, 160:6, 188:2, 198:2, 200:7, 210:3 cross-examination [1] - 140:11 cross-examine [4] - 100:17, 159:17, 160:6, 188:2 crosslink [2] - 52:7, 123:16 crosslinked [3] - 19:9, 60:24, 125:21 crosslinking [9] - 52:14, 52:21, 124:2, 124:4, 127:16, 128:5, 128:9, 179:17 crosslinks [5] - 121:18, 121:20, 122:20, 129:15, 130:19 crucially [1] - 190:1 cumulative [4] - 171:3, 190:14, 190:22, 191:6 cure [6] - 117:1, 119:22, 129:16, 170:20, 173:13, 174:24 cured [35] - 56:7, 58:2, 117:24, 118:6, 118:20, 119:5, 119:12, 119:14, 119:22, 120:4, 121:10, 121:15, 121:17, 122:1, 122:16, 122:19, 123:14, 123:20, 123:24, 124:1, 124:16, 125:20, 127:4, 127:11, 127:14, 128:8, 128:24, 129:3, 130:3, 130:18, 184:3 curing [1] - 129:16 custodian [1] - 174:9 custodians [2] - 161:23, 172:9 cut [3] - 6:1, 153:12, 201:1 cuts [1] - 87:2</p>
D		
<p>Dale [3] - 212:7, 212:19, 212:20 damages [37] - 76:3, 76:5, 76:8, 76:19, 77:1, 77:3, 90:13, 90:21, 91:8, 91:11, 91:22, 92:13, 93:17, 95:2, 95:3, 95:14,</p>		

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<p>95:21, 97:2, 98:1, 98:11, 101:5, 103:4, 103:5, 103:18, 103:24, 104:1, 104:23, 105:8, 110:22, 112:23, 113:12, 114:8, 114:17, 136:4, 136:10, 188:24</p> <p>dark [2] - 17:14, 140:13</p> <p>darkening [2] - 21:3, 21:6</p> <p>darker [4] - 18:20, 19:3, 19:17, 20:7</p> <p>date [1] - 80:6</p> <p>dates [1] - 72:18</p> <p>Daubert [2] - 6:21, 8:9</p> <p>daughters [1] - 71:11</p> <p>days [1] - 93:8</p> <p>deadline [2] - 93:2, 96:5</p> <p>deal [8] - 73:7, 75:3, 94:16, 94:17, 95:10, 138:14, 156:8, 174:20</p> <p>dealing [2] - 73:6, 92:7</p> <p>dealt [1] - 76:6</p> <p>decide [7] - 56:12, 82:12, 87:4, 133:6, 158:11, 186:13, 201:23</p> <p>decided [11] - 58:4, 75:3, 78:12, 86:5, 96:10, 97:8, 114:15, 131:21, 177:1, 186:22, 187:12</p> <p>deciding [4] - 85:1, 132:10, 189:21, 191:16</p> <p>decision [29] - 79:20, 79:22, 83:7, 84:22, 85:1, 85:17, 86:17, 86:21, 96:4, 105:7, 108:11, 108:14, 132:2, 132:12, 132:21, 133:19, 133:23, 134:2, 134:5, 134:22, 136:11, 137:10, 182:13, 185:1, 194:23, 197:8, 197:24, 201:24</p> <p>decisions [4] - 48:19, 84:11, 136:23, 176:14</p> <p>declaration [1] - 173:7</p> <p>declarations [3] - 163:6, 172:24, 197:17</p> <p>declined [1] - 74:5</p> <p>deep [3] - 45:13, 45:14, 154:10</p> <p>deeper [1] - 18:19</p> <p>defeating [1] - 95:4</p> <p>defend [3] - 75:10, 86:12, 135:14</p> <p>defendant [45] - 3:14, 5:11, 14:7, 48:2, 48:5, 48:16, 48:21, 49:6, 58:10, 63:15, 71:21, 72:13, 74:22, 90:23, 97:20, 111:21, 128:11, 133:4, 133:7, 133:16, 133:22, 134:20, 135:8, 135:9, 135:18, 144:24, 146:23, 147:4, 147:18, 151:8, 166:7, 175:14, 176:20, 182:15, 185:7, 185:20, 187:14, 187:15, 187:20, 193:7, 198:21, 201:6, 205:15, 211:2, 211:18</p> <p>Defendant [2] - 1:10, 2:16</p> <p>defendant's [15] - 4:11, 4:19, 7:18, 9:20, 10:10, 10:21, 11:1, 11:4, 71:3, 115:22, 131:19, 178:15, 182:11, 189:19, 201:10</p> <p>defendants [43] - 5:17, 5:22, 7:9, 10:3, 27:12, 27:14, 49:24, 50:4, 50:16, 51:17, 58:18, 70:15, 70:20, 71:5, 72:18, 94:23, 97:13, 97:16, 102:12, 113:10, 114:19, 138:1, 141:16, 145:4, 146:10, 147:2, 157:8, 158:7, 166:20,</p>	<p>167:12, 174:7, 174:17, 176:22, 182:5, 182:23, 183:7, 183:14, 184:21, 186:16, 187:4, 196:1, 207:24, 209:8</p> <p>defending [1] - 74:9</p> <p>defense [4] - 41:16, 49:12, 74:3, 147:15</p> <p>defenses [14] - 33:11, 50:12, 133:17, 133:21, 135:12, 147:24, 148:19, 149:14, 149:19, 150:2, 150:10, 151:6, 152:23, 155:13</p> <p>define [1] - 155:17</p> <p>defined [1] - 117:17</p> <p>definite [3] - 52:2, 57:12, 124:6</p> <p>definitely [1] - 126:20</p> <p>definition [2] - 61:18, 62:14</p> <p>degradation [8] - 70:10, 107:14, 107:15, 107:19, 107:21, 108:7, 109:1</p> <p>DELAWARE [1] - 1:2</p> <p>Delaware [3] - 1:16, 172:19, 212:1</p> <p>deliberation [1] - 205:21</p> <p>demonstratives [1] - 49:10</p> <p>denied [3] - 141:24, 187:1, 190:7</p> <p>denying [1] - 189:2</p> <p>dependent [1] - 154:5</p> <p>deponents [1] - 172:23</p> <p>depose [6] - 144:24, 165:23, 171:17, 173:18, 174:20, 188:1</p> <p>deposed [1] - 165:12</p> <p>deposit [1] - 78:20</p> <p>deposition [25] - 89:15, 117:23, 139:11, 140:23, 141:10, 157:15, 161:20, 163:5, 165:5, 168:13, 170:19, 171:4, 171:5, 171:7, 174:22, 175:1, 177:3, 196:5, 196:11, 196:12, 197:18, 203:9, 207:10, 208:6, 208:11</p> <p>depositions [17] - 138:5, 138:10, 138:12, 138:20, 139:15, 141:3, 142:24, 143:7, 143:12, 143:20, 157:21, 161:13, 165:2, 172:17, 174:8, 203:6, 207:5</p> <p>deputy [1] - 195:17</p> <p>describe [1] - 39:17</p> <p>described [4] - 29:6, 29:7, 32:20, 65:3</p> <p>description [12] - 13:14, 16:10, 26:20, 35:2, 35:7, 35:11, 35:14, 148:6, 153:1, 153:7, 154:19, 155:5</p> <p>designate [3] - 207:20, 208:18, 208:19</p> <p>designated [3] - 175:6, 209:12</p> <p>designation [1] - 208:12</p> <p>designations [7] - 196:7, 196:16, 207:11, 207:15, 207:19, 208:8, 209:3</p> <p>designee [2] - 169:11, 170:14</p> <p>despite [1] - 102:15</p> <p>detail [2] - 75:4, 112:19</p> <p>detailed [2] - 75:23, 76:13</p> <p>details [1] - 144:8</p> <p>determine [3] - 53:7, 57:12, 126:13</p> <p>determined [4] - 60:22, 124:24, 126:1, 126:22</p> <p>determining [3] - 8:11, 42:9, 91:19</p>	<p>developed [1] - 136:6</p> <p>deviation [1] - 128:21</p> <p>devices [1] - 78:19</p> <p>devoting [1] - 143:18</p> <p>dichotomy [1] - 155:8</p> <p>differ [1] - 179:12</p> <p>difference [5] - 15:9, 16:7, 18:12, 72:2, 130:3</p> <p>different [36] - 6:18, 8:19, 8:23, 13:5, 32:15, 45:12, 56:10, 57:20, 72:4, 72:12, 72:13, 72:16, 72:17, 81:2, 87:22, 88:2, 88:4, 101:3, 104:11, 116:20, 117:9, 117:18, 117:19, 118:4, 118:22, 119:24, 120:7, 120:19, 122:8, 122:10, 129:23, 132:13, 156:11, 157:21</p> <p>difficult [1] - 166:18</p> <p>diligence [1] - 171:23</p> <p>dimensional [1] - 116:23</p> <p>dip [2] - 98:9, 103:9</p> <p>dire [3] - 204:2, 204:12, 206:14</p> <p>direct [20] - 46:1, 49:5, 73:19, 88:23, 89:1, 89:6, 89:21, 90:2, 134:17, 145:20, 145:23, 146:3, 146:6, 171:18, 175:9, 194:2, 195:2, 198:2, 200:6, 210:3</p> <p>directed [5] - 33:24, 34:2, 65:20, 78:19, 190:18</p> <p>directly [7] - 46:4, 52:13, 53:15, 103:16, 168:7, 168:10, 188:23</p> <p>disagree [5] - 54:22, 59:11, 73:15, 100:3, 183:14</p> <p>disallowed [1] - 111:1</p> <p>disavowal [1] - 150:2</p> <p>disavowed [1] - 154:3</p> <p>disc [1] - 122:7</p> <p>discern [1] - 162:23</p> <p>discerned [1] - 64:12</p> <p>disclose [10] - 104:8, 105:10, 114:23, 147:3, 148:14, 154:15, 154:21, 155:20, 170:8, 196:13</p> <p>disclosed [32] - 13:16, 49:16, 50:15, 98:1, 98:12, 99:2, 100:2, 101:12, 102:17, 103:13, 103:15, 104:11, 104:13, 105:1, 148:1, 149:4, 149:8, 150:9, 154:11, 154:17, 156:5, 158:18, 161:10, 161:16, 174:4, 187:18, 188:4, 188:10, 193:24, 197:4, 197:20, 197:23</p> <p>disclosure [10] - 13:15, 115:16, 147:22, 149:1, 150:14, 161:15, 164:15, 170:3, 172:14, 173:10</p> <p>disclosures [11] - 153:23, 154:17, 158:19, 158:24, 159:1, 161:19, 170:6, 170:12, 170:13, 172:16, 174:3</p> <p>discovery [4] - 80:6, 89:14, 101:13, 156:5</p> <p>discretion [4] - 87:3, 132:13, 132:17, 203:19</p> <p>discretionary [4] - 86:21, 132:11, 137:9, 178:18</p>
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<p>discriminate ^[1] - 18:10</p> <p>discuss ^[4] - 138:3, 194:15, 202:19, 206:11</p> <p>discussed ^[2] - 157:4, 204:8</p> <p>discussion ^[2] - 6:1, 184:18</p> <p>disfavors ^[1] - 89:13</p> <p>dispositive ^[1] - 134:14</p> <p>dispute ^[25] - 6:11, 14:21, 33:17, 50:8, 64:7, 65:5, 66:9, 67:7, 83:23, 125:1, 126:4, 126:9, 126:24, 160:1, 169:23, 175:23, 183:20, 183:23, 192:2, 198:24, 199:3, 199:7, 199:13, 199:17, 210:10</p> <p>disputed ^[4] - 6:8, 47:13, 184:8, 192:23</p> <p>disputes ^[7] - 47:19, 65:6, 93:10, 192:22, 196:8, 202:19, 206:12</p> <p>disputing ^[1] - 101:21</p> <p>DiStefano ^[16] - 98:19, 99:7, 106:1, 106:5, 106:8, 107:4, 109:6, 109:7, 109:14, 185:10, 189:3, 189:6, 189:18, 189:23, 190:6, 190:7</p> <p>DiStefano's ^[6] - 98:20, 99:14, 106:11, 107:12, 108:1, 108:23</p> <p>distinct ^[1] - 73:10</p> <p>distinction ^[3] - 66:20, 86:18, 119:18</p> <p>distinctions ^[2] - 72:11, 120:10</p> <p>distorted ^[1] - 45:1</p> <p>district ^[4] - 84:11, 85:2, 139:8, 141:14</p> <p>DISTRICT ^[2] - 1:2, 1:2</p> <p>District ^[2] - 1:19, 85:5</p> <p>doable ^[2] - 201:15, 201:17</p> <p>docketed ^[1] - 204:2</p> <p>doctor ^[3] - 106:10, 140:6, 177:2</p> <p>doctors ^[1] - 138:5</p> <p>doctrine ^[1] - 146:17</p> <p>document ^[3] - 151:8, 172:18, 172:22</p> <p>documents ^[21] - 125:3, 126:4, 126:6, 129:20, 140:10, 143:10, 143:14, 162:23, 163:1, 164:13, 168:10, 168:15, 169:13, 169:15, 169:19, 169:21, 172:5, 172:10, 173:7, 174:10</p> <p>dollar ^[1] - 111:14</p> <p>done ^[10] - 13:9, 33:7, 34:6, 51:10, 94:3, 95:11, 125:17, 137:5, 147:13, 182:10</p> <p>double ^[2] - 98:9, 103:9</p> <p>doubt ^[3] - 164:3, 202:2, 210:18</p> <p>down ^[18] - 14:20, 17:15, 17:20, 20:16, 22:5, 56:22, 87:14, 112:21, 116:6, 117:4, 122:19, 124:3, 125:5, 128:18, 135:20, 143:16, 154:16, 201:1</p> <p>Dr ^[90] - 8:14, 10:1, 12:5, 12:13, 13:1, 13:10, 14:11, 14:15, 15:3, 18:16, 28:17, 32:20, 33:4, 33:12, 36:16, 37:7, 37:8, 37:14, 37:18, 37:20, 37:23, 38:16, 39:13, 39:16, 39:22, 40:20, 44:1, 44:9, 44:10, 44:15, 44:16, 45:19, 46:1, 51:7, 51:23, 52:23, 53:5, 54:7, 57:16, 60:18, 68:20, 89:16, 98:19, 98:20, 99:4, 99:7, 99:10, 99:14, 106:3, 106:8, 106:11, 107:12, 108:8, 108:20</p>	<p>108:23, 109:5, 109:6, 109:7, 109:14, 117:21, 118:7, 119:1, 127:4, 127:5, 128:3, 128:13, 129:6, 129:17, 130:4, 138:5, 138:22, 138:23, 139:18, 156:10, 156:17, 157:13, 165:6, 165:13, 165:16, 165:23, 181:1, 181:16, 190:3, 190:6, 209:16</p> <p>drag ^[2] - 64:16, 99:11</p> <p>dragging ^[1] - 203:15</p> <p>drags ^[1] - 123:23</p> <p>draw ^[2] - 164:9, 205:9</p> <p>dropped ^[2] - 110:3, 145:24</p> <p>dropping ^[1] - 89:5</p> <p>Drs ^[1] - 138:13</p> <p>due ^[4] - 113:9, 134:18, 171:23, 185:4</p> <p>during ^[13] - 75:21, 83:15, 101:12, 117:23, 137:16, 141:4, 144:15, 181:6, 193:1, 195:2, 202:22, 207:22, 209:19</p> <p>dye ^[5] - 33:16, 72:9, 118:22, 153:24, 154:1</p>	<p>encompassed ^[1] - 81:19</p> <p>encourage ^[2] - 180:6, 198:9</p> <p>encouraged ^[1] - 155:16</p> <p>end ^[10] - 3:24, 7:11, 39:7, 54:18, 57:15, 109:19, 123:20, 130:18, 160:18, 195:5</p> <p>ended ^[2] - 110:23</p> <p>energy ^[2] - 90:8, 155:22</p> <p>engine ^[1] - 35:6</p> <p>enormous ^[1] - 96:24</p> <p>enter ^[1] - 135:2</p> <p>entered ^[1] - 96:8</p> <p>entering ^[1] - 28:7</p> <p>entire ^[1] - 210:2</p> <p>entirely ^[4] - 87:8, 102:21, 134:4, 188:6</p> <p>entirety ^[1] - 7:2</p> <p>entitled ^[11] - 103:18, 103:22, 103:23, 104:4, 106:8, 110:22, 112:2, 112:6, 114:8, 114:13, 156:2</p> <p>enzymatic ^[6] - 107:13, 107:15, 107:18, 107:20, 108:7, 108:24</p> <p>equals ^[2] - 113:2</p> <p>equilibrated ^[1] - 119:5</p> <p>equilibrium ^[1] - 117:5</p> <p>equitable ^[2] - 78:3, 78:6</p> <p>equivalents ^[1] - 146:18</p> <p>erosion ^[27] - 97:23, 98:11, 99:21, 100:1, 100:16, 101:8, 101:20, 103:8, 103:11, 103:24, 104:2, 104:6, 104:23, 105:8, 106:18, 106:21, 110:6, 110:11, 113:16, 114:11, 115:6, 115:8, 115:9, 115:13, 190:15, 191:4</p> <p>erred ^[1] - 124:15</p> <p>ESI ^[1] - 172:9</p> <p>especially ^[2] - 148:3, 153:22</p> <p>ESQ ^[9] - 2:3, 2:6, 2:6, 2:7, 2:11, 2:12, 2:14, 2:15, 2:15</p> <p>essentially ^[12] - 6:7, 6:15, 11:7, 13:8, 15:16, 33:10, 34:4, 61:1, 72:1, 72:9, 119:11, 187:17</p> <p>estopped ^[10] - 74:9, 75:18, 86:7, 133:17, 139:4, 139:10, 141:12, 141:17, 142:2, 142:14</p> <p>estoppel ^[20] - 74:16, 75:1, 75:7, 78:4, 78:6, 82:21, 83:24, 84:4, 84:20, 85:8, 85:15, 86:1, 86:16, 87:2, 88:9, 88:11, 139:9, 142:19, 178:22</p> <p>estoppels ^[2] - 84:17, 84:19</p> <p>estopping ^[1] - 135:11</p> <p>Eva ^[1] - 169:7</p> <p>eva ^[1] - 171:20</p> <p>event ^[5] - 103:3, 111:1, 157:4, 189:16, 191:2</p> <p>eventually ^[3] - 102:22, 102:23, 129:10</p> <p>evidence ^[40] - 4:9, 5:18, 5:23, 28:9, 47:14, 47:18, 47:22, 48:3, 48:17, 49:17, 56:8, 58:22, 70:19, 76:4, 87:11, 88:17, 88:18, 94:5, 95:16, 99:12, 106:19, 116:7, 117:10, 120:6, 129:1, 136:6, 141:13, 160:16, 168:3, 170:24, 172:6, 182:2, 184:16, 185:16, 186:3,</p>
E		
<p>early ^[1] - 132:15</p> <p>easiest ^[1] - 158:12</p> <p>easy ^[2] - 93:21, 170:12</p> <p>eat ^[1] - 118:23</p> <p>effect ^[3] - 98:9, 104:12, 164:7</p> <p>effectively ^[2] - 59:10, 142:21</p> <p>efficient ^[2] - 179:10, 188:13</p> <p>effort ^[2] - 76:12, 173:18</p> <p>efforts ^[1] - 176:3</p> <p>eight ^[8] - 165:19, 165:23, 166:5, 166:16, 166:21, 205:18, 205:19, 205:21</p> <p>eighteen ^[3] - 200:20, 200:24, 201:24</p> <p>either ^[24] - 31:17, 35:23, 47:20, 51:19, 58:8, 74:19, 83:9, 83:20, 85:19, 95:18, 102:16, 124:17, 135:10, 137:20, 139:7, 156:6, 167:4, 192:4, 192:11, 195:4, 200:20, 204:17, 205:4, 210:7</p> <p>elect ^[1] - 86:3</p> <p>electrophilic ^[1] - 179:19</p> <p>eleven ^[1] - 7:22</p> <p>elicit ^[1] - 49:6</p> <p>elicited ^[1] - 159:12</p> <p>email ^[3] - 211:8, 211:9, 211:12</p> <p>embodiment ^[4] - 16:8, 29:6, 29:15, 43:2</p> <p>embodiments ^[1] - 27:7</p> <p>emerges ^[1] - 210:24</p> <p>employee ^[1] - 173:9</p> <p>employees ^[1] - 209:11</p> <p>enable ^[5] - 35:6, 35:12, 43:9, 43:17</p> <p>enabled ^[2] - 16:9, 149:22</p> <p>enablement ^[14] - 13:14, 13:24, 14:5, 26:18, 35:2, 43:20, 50:11, 126:6, 148:6, 153:2, 153:7, 153:11, 154:19, 155:6</p>	<p>Hawkins Reporting Service</p> <p>715 North King Street - Wilmington, Delaware 19801</p> <p>(302) 658-6697 EMAIL: Dalehrs@aol.com</p>	

<p>188:23, 193:13, 193:15, 195:4, 195:20 exact [3] - 112:16, 185:8, 185:9 exactly [16] - 14:24, 16:15, 16:22, 30:2, 46:13, 79:4, 112:20, 125:2, 148:12, 149:5, 154:7, 156:16, 165:12, 182:22, 184:21, 197:22 examination [10] - 140:11, 195:2, 198:1, 198:3, 198:8, 200:3, 203:1, 203:14, 203:16, 210:2 examine [4] - 100:17, 159:17, 160:6, 188:2 examining [1] - 198:14 example [5] - 12:7, 13:11, 30:12, 168:2, 179:10 except [3] - 57:9, 89:15, 112:7 exceptions [1] - 202:14 exclude [3] - 63:12, 100:5, 167:13 excluded [5] - 52:23, 100:7, 100:14, 100:19, 152:16 excluding [1] - 187:13 exclusive [1] - 16:16 exclusively [1] - 105:11 exemplary [2] - 84:11, 108:17 exercise [4] - 87:3, 132:12, 132:17, 205:13 exhibit [8] - 87:17, 193:12, 193:14, 193:17, 193:22, 195:4, 195:8 exhibits [8] - 49:8, 168:12, 193:11, 194:1, 194:4, 194:6, 195:22 exist [1] - 87:5 expect [4] - 36:15, 76:22, 203:18, 210:21 expecting [1] - 201:20 expended [1] - 90:7 expense [1] - 90:7 experiment [4] - 120:19, 120:23, 121:14, 123:3 experiments [4] - 33:4, 33:12, 33:22, 128:19 expert [63] - 6:16, 6:22, 8:14, 13:20, 15:6, 15:11, 23:7, 23:16, 23:23, 24:14, 24:22, 28:24, 32:20, 36:15, 39:20, 40:3, 43:21, 49:6, 49:16, 50:13, 59:20, 60:18, 64:22, 67:24, 68:2, 76:6, 103:22, 104:4, 106:5, 106:9, 108:21, 108:22, 117:10, 121:16, 123:1, 126:11, 128:7, 145:2, 147:21, 149:10, 149:15, 151:14, 152:11, 153:13, 154:2, 154:12, 156:5, 164:13, 168:11, 169:16, 169:17, 172:2, 174:10, 186:16, 186:17, 186:20, 189:6, 190:4, 196:21, 197:2, 197:12, 197:15, 197:17 expert's [6] - 6:13, 8:21, 21:4, 61:19, 68:11, 68:15 experts [29] - 7:2, 9:5, 9:20, 10:10, 10:21, 11:2, 11:4, 12:23, 14:18, 16:18, 17:18, 19:11, 20:18, 22:19, 28:2, 28:8, 34:5, 49:12, 59:9, 65:17, 91:19, 117:8, 122:9, 129:19, 145:1, 148:10, 149:21, 169:14, 172:2</p>	<p>expire [1] - 134:18 expired [1] - 135:4 expires [4] - 77:23, 78:7, 78:11, 97:8 explain [5] - 16:23, 70:3, 162:24, 185:14, 194:22 explained [4] - 38:13, 44:16, 97:5 explicitly [1] - 29:7 explore [1] - 204:23 expounding [1] - 101:3 expressly [3] - 174:3, 174:13, 175:21 extent [19] - 11:6, 34:21, 38:8, 38:21, 40:2, 53:18, 57:9, 57:21, 100:8, 105:4, 106:22, 109:19, 149:21, 152:5, 162:15, 177:21, 180:23, 182:13, 200:2 extra [1] - 197:16 eye [1] - 38:18</p> <p style="text-align: center;">F</p> <p>face [4] - 83:19, 139:6, 142:6, 142:12 faced [1] - 75:12 facing [1] - 105:23 fact [17] - 57:10, 69:18, 76:2, 82:17, 85:2, 102:15, 137:23, 163:18, 164:12, 169:7, 173:17, 174:8, 188:16, 188:17, 189:11, 195:13, 209:10 factor [4] - 89:24, 132:20, 134:13, 135:22 factors [7] - 80:2, 169:23, 171:11, 171:16, 173:19, 176:5, 187:12 facts [1] - 192:10 factual [3] - 163:2, 163:9, 192:16 factually [2] - 192:21, 193:3 fail [1] - 73:17 failure [2] - 107:7, 174:12 fair [7] - 27:9, 61:8, 100:15, 135:7, 145:13, 164:15, 176:1 fairly [2] - 100:2, 197:20 fairness [1] - 144:10 faith [2] - 175:19, 188:14 fall [3] - 14:23, 112:14, 116:6 falls [3] - 18:7, 22:8, 29:18 familiar [1] - 24:13 families [1] - 94:16 far [5] - 73:18, 91:8, 140:2, 162:16, 172:1 faulted [1] - 14:14 favor [4] - 71:22, 92:9, 171:11, 187:13 favorable [1] - 129:2 FDA [1] - 91:17 feature [3] - 11:12, 69:2, 69:19 features [4] - 14:22, 67:20, 69:10, 180:4 Federal [13] - 77:7, 87:8, 89:18, 91:1, 92:10, 95:8, 96:7, 96:11, 96:12, 96:21, 134:23, 136:17, 137:3 fellow [1] - 173:18 few [3] - 93:8, 201:3, 211:4 fewer [1] - 81:18</p>	<p>201:9, 201:14, 201:16, 202:2 fight [1] - 65:9 figure [3] - 47:7, 111:14, 205:1 figured [1] - 97:16 figuring [1] - 157:2 file [2] - 96:2, 185:21 filed [3] - 78:18, 97:15, 163:7 filling [1] - 208:11 film [1] - 125:7 final [19] - 10:18, 24:24, 30:6, 79:22, 83:7, 84:21, 85:17, 86:17, 86:18, 89:17, 96:3, 96:8, 132:1, 196:15, 202:17, 202:19, 206:3, 206:8 finality [1] - 79:19 finally [1] - 101:8 financial [1] - 199:11 findings [4] - 55:11, 77:11, 77:12, 132:24 fine [7] - 35:17, 166:1, 166:4, 166:23, 193:8, 208:6, 210:13 finish [3] - 98:16, 203:15, 205:7 firm [3] - 3:16, 165:7, 165:8 firmer [1] - 118:15 first [42] - 4:6, 5:16, 7:10, 9:9, 11:8, 14:9, 17:16, 18:4, 24:5, 34:12, 35:23, 36:5, 36:10, 47:11, 48:8, 56:12, 59:2, 68:1, 71:8, 71:24, 75:5, 83:2, 97:14, 97:23, 99:19, 101:4, 106:21, 107:4, 109:17, 112:19, 128:17, 138:1, 158:22, 168:23, 176:19, 187:2, 199:2, 200:22, 204:4, 204:7, 206:9, 210:5 firsthand [1] - 162:5 fit [1] - 198:17 five [21] - 52:8, 53:3, 54:3, 54:4, 57:13, 72:10, 73:24, 88:20, 101:2, 102:3, 113:2, 116:9, 122:1, 122:17, 123:21, 124:21, 125:4, 129:4, 185:6, 185:19, 201:5 five-page [1] - 185:19 fixed [1] - 65:12 flag [2] - 157:5, 199:4 floating [1] - 117:1 Flombaum [8] - 14:15, 37:7, 37:20, 44:9, 44:15, 51:7, 156:10, 157:9 Flombaum's [4] - 37:14, 37:23, 39:22, 156:17 focus [1] - 116:1 folds [1] - 66:21 folks [1] - 157:14 follow [3] - 30:11, 205:1 follow-up [1] - 205:1 followed [1] - 42:15 following [2] - 10:6, 19:24 footnote [3] - 105:5, 115:17, 191:1 FOR [1] - 1:2 forced [1] - 207:21 forcing [1] - 152:20 foregoing [1] - 212:9 forever [2] - 142:1, 144:1</p>
---	--	--

Hawkins Reporting Service

715 North King Street - Wilmington, Delaware 19801

(302) 658-6697 EMAIL: Dalehrs@aol.com

<p>forget ^[1] - 173:22 forgotten ^[1] - 148:18 form ^[19] - 17:24, 53:4, 54:2, 75:24, 95:20, 116:16, 116:23, 119:17, 125:6, 125:24, 127:15, 130:2, 130:6, 130:20, 151:9, 179:18, 183:22, 204:13, 206:8 formally ^[1] - 195:3 formation ^[2] - 55:2, 130:5 formed ^[19] - 52:1, 52:8, 53:3, 60:23, 61:4, 63:7, 69:23, 122:20, 124:2, 124:23, 125:13, 125:15, 126:13, 126:16, 126:21, 128:7, 129:14, 129:15, 130:20 forming ^[5] - 73:24, 106:9, 129:23, 130:1, 179:21 forms ^[10] - 57:13, 57:18, 72:10, 116:9, 119:3, 119:4, 124:21, 125:4, 127:9, 129:20 formulate ^[2] - 174:22, 176:13 forth ^[4] - 80:23, 113:14, 182:18, 205:15 forward ^[29] - 88:24, 89:15, 95:6, 96:16, 110:10, 133:22, 135:10, 135:24, 138:6, 138:10, 138:20, 139:16, 139:19, 140:14, 140:22, 141:10, 142:23, 143:1, 143:8, 143:20, 147:24, 148:9, 153:7, 157:21, 170:17, 180:6, 183:8, 184:13, 192:9 foundation ^[2] - 172:4, 193:19 four ^[17] - 35:6, 48:1, 48:15, 48:19, 49:2, 49:20, 50:1, 50:6, 101:2, 117:12, 118:13, 118:21, 128:21, 143:23, 145:23, 209:14, 210:14 four-and-a-half ^[1] - 117:12 fourteen ^[1] - 205:10 fourth ^[3] - 22:14, 23:1, 40:24 frame ^[1] - 120:1 frames ^[1] - 125:18 free ^[3] - 155:16, 202:7, 208:23 freely ^[1] - 198:6 freestanding ^[1] - 116:20 Friday ^[3] - 6:7, 185:5, 185:19 front ^[7] - 66:11, 74:10, 75:19, 92:15, 96:6, 132:18, 133:18 full ^[8] - 14:18, 15:17, 16:8, 27:2, 27:7, 98:5, 134:15, 135:17 fully ^[35] - 56:7, 58:2, 97:7, 117:24, 118:5, 118:6, 118:20, 119:4, 119:12, 119:14, 119:22, 120:4, 121:10, 121:15, 121:17, 122:1, 122:16, 122:19, 123:14, 123:20, 123:24, 124:1, 124:15, 124:16, 125:20, 127:4, 127:11, 127:14, 128:8, 128:24, 129:3, 130:3, 130:18, 184:3 functional ^[7] - 52:6, 52:19, 119:7, 119:15, 128:6, 179:19, 179:20 fundamental ^[1] - 75:14 fundamentally ^[1] - 175:4 future ^[2] - 117:5, 135:21</p>	<p style="text-align: center;">G</p> <p>game ^[1] - 102:11 gaps ^[2] - 38:20, 38:24 gel ^[39] - 56:9, 58:2, 116:10, 116:11, 116:12, 117:7, 117:15, 117:17, 117:22, 118:2, 118:5, 118:17, 119:12, 119:21, 119:22, 120:6, 120:12, 120:14, 121:7, 121:10, 122:6, 122:10, 122:12, 123:2, 124:16, 124:17, 128:16, 128:19, 128:20, 129:1, 129:20, 130:1, 130:5, 130:6, 130:17, 148:24, 184:3 general ^[5] - 42:15, 58:20, 162:8, 198:1, 199:18 generally ^[1] - 4:1 generic ^[1] - 19:2 genuine ^[1] - 174:17 German ^[2] - 138:5, 177:2 Germany ^[5] - 138:23, 140:7, 140:9, 165:10, 166:17 given ^[10] - 92:22, 135:17, 140:18, 147:5, 158:1, 171:5, 171:6, 174:7, 178:22, 208:23 gosh ^[1] - 160:19 govern ^[1] - 192:8 graduations ^[1] - 71:10 grant ^[5] - 100:11, 106:2, 131:21, 132:5, 134:12 granted ^[2] - 187:1, 187:2 granting ^[7] - 89:13, 106:21, 155:15, 187:6, 189:1, 189:9, 191:17 graphic ^[2] - 120:1, 130:19 GRAVES ^[40] - 2:14, 5:12, 71:7, 71:13, 73:3, 74:21, 77:5, 78:16, 79:4, 79:10, 79:15, 79:21, 94:24, 104:14, 141:19, 142:7, 142:11, 142:15, 143:6, 166:3, 166:23, 176:21, 177:24, 178:10, 178:17, 193:8, 196:2, 198:22, 199:14, 200:15, 201:12, 202:10, 203:23, 206:1, 206:21, 208:2, 209:9, 210:13, 211:3, 211:19 Graves ^[1] - 3:17 great ^[3] - 92:3, 112:18, 155:23 greater ^[5] - 50:22, 135:24, 136:3, 136:13 greatly ^[2] - 73:11, 77:18 green ^[33] - 17:13, 17:14, 17:16, 17:17, 17:21, 17:22, 18:5, 18:18, 18:19, 18:20, 19:3, 19:17, 21:3, 21:6, 21:12, 21:21, 38:19, 38:20, 38:23, 38:24, 39:18, 45:13, 45:14, 45:18, 45:24, 46:2, 46:8, 46:9, 46:10, 154:10, 154:11 greens ^[1] - 22:8 GRIMM ^[15] - 2:11, 3:12, 158:9, 159:15, 159:21, 160:5, 163:15, 163:18, 164:3, 167:7, 168:21, 169:24, 170:4, 173:5, 176:11</p>	<p>Grimm ^[5] - 3:13, 163:13, 167:6, 168:19, 173:3 grossly ^[1] - 14:10 ground ^[3] - 74:6, 75:11, 83:14 grounds ^[5] - 88:20, 141:23, 142:9, 147:22, 150:14 groups ^[7] - 52:6, 52:19, 119:7, 119:15, 128:6, 179:19, 179:20 guess ^[9] - 5:15, 35:19, 37:3, 87:1, 88:14, 106:4, 138:18, 149:10, 176:19 guidance ^[1] - 61:18 guide ^[1] - 95:23 guys ^[1] - 93:15</p> <p style="text-align: center;">H</p> <p>half ^[4] - 117:12, 131:9, 171:19, 175:10 hand ^[6] - 47:17, 72:8, 77:17, 95:9, 204:15, 212:15 handle ^[2] - 192:22, 195:22 handling ^[1] - 141:3 hang ^[1] - 67:22 happily ^[1] - 154:16 happy ^[4] - 98:13, 137:24, 143:20, 153:19 harbor ^[1] - 85:7 hard ^[2] - 137:2, 137:3 harm ^[2] - 97:10, 135:6 harmful ^[1] - 64:21 Harrison ^[30] - 158:7, 158:17, 158:22, 159:7, 160:4, 160:20, 161:8, 161:22, 162:7, 162:8, 162:18, 163:7, 163:19, 164:8, 167:4, 167:10, 167:16, 167:20, 167:22, 168:4, 168:6, 168:14, 169:12, 169:20, 171:17, 171:22, 173:1, 173:24, 174:6, 175:18 Hartlage ^[1] - 165:13 hat ^[1] - 67:22 Hawkins ^[3] - 212:7, 212:19, 212:20 head ^[4] - 74:16, 152:14, 170:8, 175:20 headings ^[3] - 13:10, 58:14, 149:11 health ^[1] - 165:18 hear ^[16] - 14:7, 53:22, 71:5, 79:23, 87:11, 88:5, 88:17, 94:5, 97:13, 109:13, 124:10, 132:23, 137:24, 145:3, 172:3, 200:19 heard ^[15] - 24:12, 41:4, 63:24, 79:11, 98:19, 128:23, 141:19, 143:21, 148:14, 150:15, 168:24, 169:19, 177:3, 191:9, 208:23 hearing ^[2] - 135:15, 182:15 hearsay ^[2] - 163:23, 172:3 heavily ^[1] - 90:1 held ^[10] - 12:1, 12:15, 52:18, 71:17, 71:20, 114:10, 139:8, 141:23, 149:7, 178:21 help ^[11] - 6:7, 41:21, 47:4, 73:4, 151:3, 164:19, 182:22, 183:2, 183:12, 184:20, 199:23</p>
---	---	--

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<p>helped [1] - 168:15</p> <p>helpful [7] - 56:2, 151:5, 151:12, 184:13, 198:10, 200:7, 201:18</p> <p>helps [1] - 199:22</p> <p>hereby [3] - 48:11, 192:8, 212:9</p> <p>hereunto [1] - 212:14</p> <p>herring [1] - 35:3</p> <p>high [1] - 170:22</p> <p>higher [1] - 170:9</p> <p>highlighted [1] - 33:8</p> <p>highly [3] - 77:13, 78:8, 96:9</p> <p>histories [2] - 82:7, 82:19</p> <p>history [3] - 75:13, 81:23, 82:4</p> <p>hit [2] - 54:17, 152:14</p> <p>hitting [1] - 123:12</p> <p>hold [1] - 183:10</p> <p>holding [1] - 176:24</p> <p>holiday [1] - 211:7</p> <p>honestly [1] - 173:22</p> <p>Honor [208] - 3:5, 3:13, 5:9, 5:12, 6:3, 6:15, 7:16, 7:24, 8:5, 9:3, 9:17, 11:20, 11:22, 12:4, 13:1, 13:6, 14:8, 15:3, 17:1, 17:9, 26:4, 27:18, 28:16, 29:21, 30:3, 32:13, 33:6, 33:20, 34:16, 34:23, 35:20, 36:7, 36:13, 37:6, 38:8, 40:12, 44:6, 45:7, 46:20, 47:1, 51:2, 51:21, 53:9, 53:23, 55:9, 58:3, 58:13, 58:16, 59:3, 60:2, 60:9, 61:22, 63:13, 65:22, 68:7, 68:10, 69:10, 69:18, 70:6, 70:16, 71:8, 71:13, 74:2, 75:21, 76:2, 77:6, 79:4, 79:11, 80:1, 81:11, 82:24, 83:3, 84:3, 84:24, 85:24, 86:15, 87:23, 89:8, 91:3, 92:5, 92:24, 93:4, 93:20, 94:13, 94:24, 96:14, 97:11, 97:20, 100:21, 101:1, 106:7, 106:16, 106:17, 107:12, 108:5, 108:16, 108:18, 108:19, 110:4, 111:16, 114:21, 115:15, 122:6, 123:8, 124:9, 124:12, 127:23, 128:12, 131:4, 138:2, 138:21, 139:20, 139:23, 141:11, 144:4, 144:13, 145:6, 145:15, 146:9, 146:12, 146:24, 147:7, 147:10, 147:16, 147:20, 148:22, 150:13, 150:20, 151:4, 151:12, 151:18, 152:3, 152:11, 152:19, 153:18, 154:24, 156:15, 157:7, 157:10, 157:16, 158:5, 158:10, 158:16, 158:21, 159:16, 159:22, 160:13, 161:1, 161:7, 161:13, 163:16, 164:10, 164:15, 165:1, 165:22, 166:3, 166:10, 166:24, 167:8, 169:14, 169:24, 171:15, 176:9, 176:11, 176:22, 178:18, 179:3, 179:23, 180:6, 181:23, 182:20, 183:5, 183:16, 190:9, 190:11, 190:21, 190:24, 191:21, 193:5, 193:9, 195:24, 196:2, 198:20, 198:22, 199:7, 199:15, 200:13, 200:15, 200:23, 201:13, 202:9, 202:10, 203:22, 203:23, 205:24, 206:1, 206:20, 206:21, 207:4, 207:16, 207:23, 209:2, 209:7, 211:3, 211:16, 211:19</p>	<p>Honor's [6] - 8:5, 71:19, 100:13, 138:11, 142:18, 191:8</p> <p>HONORABLE [1] - 1:18</p> <p>hope [1] - 59:21</p> <p>hopefully [4] - 17:11, 155:21, 185:22, 192:20</p> <p>hoping [2] - 26:6, 200:4</p> <p>host [1] - 138:9</p> <p>hour [4] - 131:10, 171:19, 175:10, 201:17</p> <p>hours [9] - 118:13, 118:21, 127:17, 200:18, 200:20, 200:22, 200:24, 201:3, 201:9</p> <p>human [4] - 12:8, 12:11, 13:24, 38:18</p> <p>hung [1] - 24:9</p> <p>hurdles [1] - 97:10</p> <p>Hydrogel [1] - 118:21</p> <p>hydrogel [71] - 12:12, 13:19, 19:7, 19:8, 31:14, 38:18, 38:19, 52:1, 52:8, 53:2, 53:4, 54:2, 55:2, 56:7, 57:12, 60:6, 60:16, 60:21, 60:23, 61:11, 61:24, 62:10, 63:5, 63:6, 65:14, 67:19, 68:12, 68:18, 69:22, 72:10, 73:24, 116:9, 118:1, 118:6, 118:21, 119:3, 119:4, 119:5, 119:12, 119:14, 120:4, 121:11, 121:15, 121:17, 122:1, 122:16, 122:19, 122:21, 123:14, 123:15, 123:17, 123:20, 124:1, 124:21, 125:6, 125:11, 126:13, 126:16, 128:7, 129:3, 129:20, 129:23, 130:1, 130:2, 130:18, 178:3, 179:18, 179:20, 183:22, 184:3</p> <p>hydrogels [6] - 11:13, 33:13, 59:2, 59:10, 65:16, 78:21</p> <p>HyperBranch [7] - 3:14, 73:20, 73:22, 74:8, 90:5, 124:14, 157:11</p> <p>HYPERBRANCH [1] - 1:9</p> <p>HyperBranch's [3] - 125:3, 165:13, 207:5</p>	<p>impacted [3] - 90:21, 154:6, 182:14</p> <p>implicated [2] - 137:15, 159:24</p> <p>implication [1] - 40:5</p> <p>implicitly [1] - 161:16</p> <p>important [7] - 17:3, 69:10, 120:10, 160:12, 188:23, 190:2, 197:10</p> <p>importantly [1] - 188:22</p> <p>impossible [2] - 95:19, 135:1</p> <p>imprecision [1] - 98:2</p> <p>IN [2] - 1:2, 212:14</p> <p>INC [2] - 1:5, 1:9</p> <p>INCEPT [1] - 1:6</p> <p>incision [1] - 123:11</p> <p>inclined [1] - 179:7</p> <p>include [3] - 15:8, 115:5, 196:10</p> <p>included [1] - 64:1</p> <p>includes [3] - 16:16, 40:5, 60:15</p> <p>including [4] - 73:10, 73:24, 96:24, 178:21</p> <p>inclusion [3] - 29:20, 77:8, 99:2</p> <p>inconsistent [44] - 4:9, 5:19, 7:9, 12:18, 13:7, 22:15, 27:12, 32:7, 32:21, 39:10, 39:20, 41:18, 43:21, 47:14, 48:4, 48:23, 49:18, 50:17, 50:24, 51:18, 53:19, 56:6, 58:11, 58:22, 59:17, 63:10, 63:16, 67:4, 69:11, 69:16, 70:21, 177:8, 180:9, 180:11, 180:18, 181:12, 182:2, 182:24, 184:16, 184:22, 185:11, 185:16, 186:18</p> <p>inconvenience [1] - 209:22</p> <p>indefinite [10] - 7:19, 55:13, 64:9, 66:23, 117:20, 130:17, 153:2, 153:10, 180:15, 180:19</p> <p>indefiniteness [26] - 7:16, 13:21, 51:15, 51:23, 52:11, 53:1, 53:11, 53:17, 53:24, 54:19, 54:24, 55:21, 56:14, 64:14, 65:9, 120:17, 122:12, 122:15, 148:6, 148:23, 153:8, 154:18, 155:4, 178:14, 182:9</p> <p>independent [1] - 66:8</p> <p>indicate [5] - 13:18, 19:9, 31:1, 34:20, 44:18</p> <p>indicated [4] - 89:13, 162:3, 165:21, 171:21</p> <p>indicates [5] - 23:8, 39:1, 40:15, 46:3, 163:20</p> <p>indicating [3] - 10:19, 109:5, 111:12</p> <p>indication [2] - 25:4, 30:23</p> <p>indirect [1] - 73:18</p> <p>indirectly [1] - 71:20</p> <p>individual [1] - 170:8</p> <p>individually [1] - 204:17</p> <p>inevitable [1] - 103:4</p> <p>information [15] - 140:8, 148:15, 160:21, 161:11, 161:18, 162:4, 162:5, 163:2, 163:10, 167:1, 167:24, 168:17, 174:14, 174:21, 199:11</p> <p>infringe [8] - 11:13, 12:14, 15:12, 15:14, 16:5, 16:6, 16:12, 26:2</p> <p>infringed [5] - 71:20, 76:7, 76:9, 95:4,</p>
I		
	<p>idea [4] - 86:4, 86:11, 116:8, 166:20</p> <p>identification [1] - 157:12</p> <p>identifications [1] - 48:1</p> <p>identified [24] - 4:24, 5:6, 5:24, 6:15, 12:4, 28:10, 32:12, 33:3, 35:24, 41:1, 48:9, 70:12, 144:22, 145:2, 158:23, 159:2, 160:11, 164:8, 172:9, 172:17, 174:2, 174:6, 179:12, 181:10</p> <p>identifies [1] - 68:21</p> <p>identify [14] - 6:7, 9:4, 49:7, 49:9, 62:21, 140:1, 153:20, 155:10, 159:5, 174:12, 175:21, 185:8, 192:2, 194:3</p> <p>identifying [4] - 151:10, 152:7, 152:22, 152:24</p> <p>imagine [3] - 135:1, 137:2, 210:8</p> <p>immediate [2] - 125:8, 125:9</p> <p>impact [7] - 77:2, 79:19, 92:16, 97:2, 137:17, 178:8, 182:16</p>	

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<p>132:6 infringement [62] - 10:24, 14:13, 19:18, 23:17, 35:21, 40:23, 41:12, 44:21, 45:9, 47:20, 48:8, 49:21, 55:12, 56:13, 57:6, 57:9, 57:21, 57:24, 73:17, 73:18, 73:20, 74:10, 75:12, 77:2, 77:9, 77:11, 77:21, 78:1, 80:17, 80:20, 87:4, 88:24, 89:2, 89:4, 89:6, 91:5, 92:16, 95:21, 97:4, 98:22, 103:19, 104:3, 114:4, 114:9, 115:23, 121:13, 133:9, 133:13, 145:19, 145:20, 145:23, 146:3, 146:6, 146:18, 146:21, 148:8, 153:21, 154:22, 155:8, 178:14, 180:3, 189:6 infringer [3] - 86:12, 133:5, 133:7 infringes [1] - 90:23 infringing [3] - 102:8, 110:20, 112:15 inherently [1] - 136:2 initial [9] - 5:21, 10:18, 24:23, 30:6, 117:16, 122:13, 128:14, 161:18, 192:1 initiates [1] - 116:17 injunction [4] - 77:20, 78:10, 97:3, 97:7 injunctive [1] - 135:2 inordinate [1] - 136:22 input [2] - 162:24, 163:1 inside [9] - 34:24, 42:1, 42:3, 50:8, 98:10, 100:1, 101:9, 104:2, 117:1 inspection [5] - 53:7, 124:24, 126:1, 126:12, 126:22 instance [3] - 170:21, 171:11, 203:12 instead [1] - 105:11 institute [1] - 74:6 instituted [2] - 85:12, 85:16 institution [4] - 79:13, 79:16, 141:22, 142:9 institutions [1] - 141:23 instruct [3] - 50:11, 92:14, 136:7 instructed [1] - 91:4 instruction [5] - 92:20, 92:23, 93:8, 93:11, 122:23 instructions [13] - 75:23, 76:13, 76:20, 91:9, 91:10, 118:14, 192:24, 202:16, 202:17, 202:20, 206:3, 206:9, 206:14 Integra [4] - 110:21, 173:9, 209:11 INTEGRA [2] - 1:4, 1:5 integrity [3] - 62:2, 62:13, 69:9 intend [10] - 5:22, 7:4, 49:8, 49:10, 59:17, 146:17, 194:1, 196:10, 196:14, 208:9 intended [1] - 113:11 intending [1] - 12:16 intends [3] - 147:4, 187:16, 191:10 intention [1] - 209:18 inter [2] - 83:5, 83:16 interest [4] - 83:8, 89:19, 135:6, 208:11 interesting [2] - 71:15, 132:7 International [3] - 83:12, 85:3, 172:20 interpret [1] - 52:3 interpretation [5] - 52:12, 52:17, 83:24, 99:6, 151:24 interpretations [2] - 149:20, 152:3</p>	<p>interpreted [3] - 8:14, 44:10, 60:11 interpreting [1] - 148:10 interrogatories [1] - 158:20 interrogatory [2] - 159:3, 161:22 interrupting [1] - 203:13 introduce [3] - 3:9, 48:3, 207:9 introduced [1] - 168:12 introducing [1] - 187:5 invalid [11] - 13:13, 13:23, 16:10, 26:11, 43:13, 77:12, 78:1, 83:14, 95:7, 95:22, 151:11 invalidate [1] - 86:13 invalidated [3] - 76:23, 83:19, 142:17 invalidating [1] - 74:23 invalidity [48] - 7:1, 12:22, 13:5, 16:13, 26:9, 26:10, 26:24, 27:16, 28:6, 30:1, 30:8, 30:11, 30:15, 32:6, 33:11, 41:12, 41:14, 43:4, 47:21, 48:7, 49:23, 50:6, 57:9, 74:3, 88:17, 88:18, 88:20, 133:10, 133:14, 133:17, 133:21, 138:7, 142:10, 147:3, 147:12, 148:3, 148:5, 150:20, 150:22, 150:24, 151:6, 152:23, 155:9, 155:13, 180:20, 180:24, 181:2 inventors [1] - 72:16 investigation [1] - 167:23 involved [4] - 66:21, 81:23, 168:7, 168:10 IPR [8] - 74:6, 74:14, 84:14, 85:12, 86:6, 132:24, 142:19, 178:22 irrelevant [1] - 106:12 irreparable [2] - 97:10, 135:6 issue [79] - 6:21, 23:5, 34:23, 37:22, 38:1, 43:7, 46:16, 54:19, 54:24, 55:2, 56:21, 57:19, 58:2, 59:5, 60:7, 61:21, 65:14, 66:5, 67:10, 69:4, 70:12, 78:21, 80:17, 82:20, 84:6, 88:12, 91:5, 96:17, 98:14, 98:17, 98:19, 108:2, 108:20, 109:17, 109:18, 118:9, 121:22, 123:22, 131:18, 134:7, 134:11, 142:19, 144:18, 145:4, 146:13, 147:6, 148:4, 148:23, 154:5, 155:1, 155:4, 157:21, 158:15, 159:11, 159:14, 159:16, 160:9, 160:17, 164:11, 167:3, 173:23, 177:3, 178:3, 178:14, 180:7, 180:17, 182:9, 184:11, 186:14, 189:20, 191:17, 192:3, 198:24, 206:16, 207:4, 208:16, 209:5, 209:9, 210:24 issued [1] - 209:13 issues [76] - 4:2, 4:4, 4:23, 5:1, 5:5, 5:16, 6:8, 26:19, 32:9, 32:13, 32:14, 34:1, 34:7, 46:19, 51:14, 56:4, 57:4, 57:10, 58:16, 72:12, 73:11, 73:13, 73:22, 80:4, 80:9, 80:12, 80:14, 88:6, 90:14, 93:13, 94:19, 97:22, 99:9, 99:12, 106:12, 116:4, 119:10, 131:15, 133:8, 134:8, 135:5, 136:19, 137:13, 137:18, 137:22, 138:3, 138:9, 138:12, 143:19, 144:22, 148:13, 150:6</p>	<p>150:24, 152:6, 152:13, 154:5, 154:16, 157:4, 176:14, 176:17, 176:19, 178:20, 180:9, 181:11, 182:11, 182:12, 182:17, 183:21, 186:1, 191:24, 192:16, 192:17, 193:3, 204:8, 206:22 IT [2] - 165:7, 165:8 itemized [1] - 147:16 itself [3] - 74:9, 88:15, 188:10 Iwanicki [4] - 3:10, 32:16, 34:11, 45:18 IWANICKI [56] - 2:6, 7:15, 7:24, 8:4, 8:23, 9:13, 9:16, 9:23, 10:7, 10:11, 11:3, 11:19, 12:3, 12:24, 34:16, 35:20, 36:7, 36:20, 37:2, 37:5, 38:7, 40:12, 41:5, 41:20, 41:23, 42:8, 42:21, 43:6, 43:23, 51:2, 51:5, 51:12, 51:21, 57:8, 58:13, 60:2, 60:9, 68:10, 107:11, 108:5, 108:16, 109:8, 147:7, 147:10, 151:4, 151:18, 151:21, 152:2, 153:9, 154:24, 179:2, 179:5, 182:6, 182:19, 183:4, 190:9</p> <p style="text-align: center;">J</p> <p>Jacobs [11] - 84:6, 88:12, 138:5, 138:13, 139:4, 139:18, 141:17, 142:6, 157:13, 181:3, 201:7 Jaros [23] - 98:7, 98:9, 99:24, 100:15, 101:1, 101:16, 101:23, 102:15, 102:19, 103:2, 103:7, 109:20, 115:6, 163:8, 168:12, 187:4, 187:7, 187:9, 187:17, 188:1, 188:9, 188:11, 189:2 Jaros' [1] - 191:19 Jaros's [12] - 97:23, 98:13, 99:20, 100:19, 101:13, 102:13, 103:14, 104:1, 105:6, 105:9, 163:3, 190:12 Jell [3] - 118:10, 118:12, 118:21 Jell-O [3] - 118:10, 118:12, 118:21 JEREMY [1] - 2:12 Jeremy [1] - 3:15 Jersey [1] - 85:5 jive [1] - 39:13 JMOL [2] - 78:2, 78:6 JOHN [1] - 2:6 John [1] - 3:10 joint [1] - 145:18 jointly [1] - 192:7 JONATHAN [1] - 2:14 Jonathan [1] - 3:17 JR [1] - 2:6 judge [3] - 57:15, 124:19, 132:4 Judge [29] - 1:19, 6:21, 31:24, 32:17, 45:2, 53:6, 55:10, 55:19, 57:10, 57:23, 58:3, 65:2, 65:21, 71:14, 91:21, 116:7, 118:18, 120:3, 124:13, 125:23, 126:19, 128:1, 130:9, 133:2, 136:22, 137:3, 183:11, 184:7, 189:9 judge's [2] - 176:23, 179:24 judgment [21] - 4:20, 38:14, 45:20, 55:7,</p>
--	---	--

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57:6, 57:21, 58:7, 68:3, 77:21, 77:24, 80:17, 96:8, 115:23, 124:14, 127:2, 130:11, 132:5, 134:7, 179:9, 189:10, 203:3
jump [1] - 5:7
juror [6] - 38:15, 204:19, 204:22, 205:2, 205:3, 205:5
jurors [2] - 204:14, 205:10
jury [73] - 3:22, 43:19, 50:11, 70:3, 72:20, 72:22, 73:12, 74:10, 75:11, 75:19, 75:23, 76:19, 77:24, 82:3, 82:9, 82:13, 86:22, 87:4, 87:10, 87:16, 88:1, 88:5, 90:20, 90:22, 91:3, 92:14, 92:19, 93:10, 93:16, 93:22, 94:4, 94:21, 95:14, 95:23, 106:10, 109:8, 109:13, 121:15, 121:24, 122:15, 132:18, 132:23, 133:3, 135:11, 135:15, 136:4, 136:7, 136:9, 140:16, 143:7, 148:19, 192:12, 192:15, 192:24, 193:22, 194:7, 194:16, 195:1, 198:11, 198:15, 202:14, 202:19, 203:24, 204:3, 204:6, 204:9, 204:18, 205:9, 205:11, 205:18, 205:22, 205:23, 206:3
jury's [2] - 77:3, 133:20
justice [1] - 89:19

K

Karen [1] - 3:7
KAREN [1] - 2:3
keep [4] - 20:23, 44:12, 129:12, 203:21
keeping [1] - 97:1
kept [1] - 140:12
kind [5] - 7:3, 117:16, 119:13, 164:10, 171:9
King [1] - 1:15
Kingdom [1] - 165:14
knocked [1] - 112:14
knocking [1] - 6:24
knowledge [4] - 160:16, 168:16, 169:1, 169:5
known [8] - 84:14, 85:9, 110:24, 113:10, 117:7, 161:8, 174:7
knows [3] - 57:17, 152:12, 169:14

L

lack [12] - 13:13, 13:14, 13:23, 15:15, 26:18, 26:19, 95:5, 153:1, 153:2, 155:5
lacking [1] - 190:16
lacks [2] - 14:5, 153:11
laid [1] - 105:18
language [8] - 9:19, 52:3, 75:5, 83:4, 85:15, 124:19, 124:20, 183:17
large [2] - 150:21
last [5] - 15:1, 170:17, 171:9, 175:17, 211:5
late [4] - 134:3, 170:3, 170:24, 176:2

law [4] - 141:14, 141:21, 180:4, 203:4
lawsuit [1] - 107:17
lay [1] - 193:19
layer [5] - 17:17, 17:18, 17:21, 17:22, 18:7
layers [2] - 17:15, 124:3
laying [1] - 172:4
learn [1] - 164:4
learned [2] - 164:1, 174:21
least [20] - 3:24, 32:8, 36:23, 41:15, 48:16, 49:4, 58:23, 90:13, 92:3, 92:13, 114:17, 136:10, 148:16, 186:10, 193:21, 197:21, 199:23, 201:22, 204:20, 210:22
leave [4] - 118:12, 130:7, 198:3, 198:5
leaves [1] - 205:3
left [15] - 12:23, 35:19, 37:23, 38:2, 61:19, 69:24, 73:15, 74:3, 80:15, 91:6, 109:19, 113:5, 133:13, 167:3, 205:9
legal [2] - 192:17, 192:22
legislative [1] - 75:13
lengthy [2] - 7:11, 171:5
Lennox [3] - 159:8, 160:6, 168:13
Lennox's [1] - 163:6
Lenox [1] - 209:16
LEONARD [1] - 1:18
less [10] - 72:10, 77:23, 96:19, 103:21, 118:14, 128:16, 134:12, 136:18, 171:7, 171:18
letter [5] - 185:4, 185:7, 185:20, 185:22, 202:5
letters [1] - 176:3
level [1] - 64:12
liability [4] - 89:3, 145:19, 146:4, 146:7
license [2] - 91:12, 91:18
licenses [1] - 169:3
LIFESCIENCES [2] - 1:4, 1:5
LifeTech [1] - 89:22
light [6] - 32:19, 77:14, 129:2, 146:13, 170:24, 206:4
likely [10] - 4:22, 78:5, 95:7, 96:9, 96:19, 134:12, 136:9, 136:18, 136:24, 143:3
limine [9] - 4:17, 100:6, 108:3, 108:19, 186:1, 186:24, 188:18, 189:5, 189:21
limit [3] - 86:5, 180:2, 198:1
limitation [15] - 7:14, 28:22, 38:3, 42:11, 59:13, 60:15, 81:1, 81:4, 107:13, 107:20, 107:21, 109:3, 179:14, 179:15, 183:24
limitations [18] - 8:12, 9:21, 9:22, 36:6, 42:17, 43:11, 64:1, 80:23, 81:6, 81:7, 81:15, 81:18, 81:19, 82:9, 82:18, 151:10, 152:24, 179:16
limited [5] - 62:14, 109:1, 152:12, 188:3, 202:14
Limited [1] - 85:4
limiting [1] - 45:3
limits [1] - 47:6
line [3] - 18:23, 22:24, 92:1

linked [1] - 34:17
liquid [1] - 121:4
list [23] - 4:23, 12:10, 108:17, 108:18, 149:9, 151:6, 153:14, 153:19, 157:13, 157:18, 157:23, 158:3, 159:9, 161:14, 161:17, 161:19, 161:21, 164:17, 174:1, 175:18, 193:12, 193:13, 209:11
listed [2] - 10:6, 201:4
listening [1] - 29:3
lists [2] - 87:17, 87:18
literal [1] - 146:20
litigating [1] - 78:10
litigation [4] - 78:14, 80:5, 86:5, 134:24
live [11] - 99:10, 99:15, 109:9, 109:13, 208:4, 208:5, 208:10, 209:10, 209:12, 210:1, 210:15
LLC [2] - 1:5, 1:6
LLP [2] - 2:11, 2:14
logistics [1] - 166:24
Looby [1] - 211:10
look [34] - 5:4, 6:20, 6:22, 14:13, 14:24, 15:6, 18:9, 22:10, 33:7, 33:11, 34:22, 35:13, 38:4, 44:14, 45:23, 54:9, 57:17, 64:19, 66:7, 66:10, 77:22, 84:4, 84:10, 89:20, 91:21, 110:19, 114:23, 127:8, 129:11, 135:20, 149:10, 151:14, 183:13, 197:23
looked [8] - 17:6, 19:11, 19:12, 22:6, 54:7, 65:2, 120:1, 132:14
looking [20] - 19:6, 21:24, 22:2, 31:1, 31:19, 31:24, 33:2, 33:6, 33:16, 38:5, 38:22, 40:4, 40:7, 53:8, 60:12, 63:12, 90:3, 147:9, 147:11, 153:4
looks [4] - 18:2, 29:9, 115:15, 132:13
lose [2] - 68:3, 141:9
loses [1] - 197:6
lost [40] - 67:11, 75:8, 75:9, 101:5, 101:6, 101:7, 101:18, 101:22, 102:1, 102:9, 102:22, 103:4, 104:19, 110:21, 111:1, 111:3, 112:1, 112:2, 112:5, 112:11, 112:15, 114:5, 114:13, 114:14, 114:16, 115:4, 115:5, 115:7, 115:10, 115:12, 191:2, 191:3
loud [1] - 204:11
Lowman [25] - 8:14, 12:5, 12:13, 13:1, 14:15, 15:3, 32:20, 33:4, 33:12, 36:16, 37:8, 37:18, 40:20, 44:10, 44:16, 46:1, 53:5, 54:7, 57:16, 128:3, 129:6, 129:17, 130:4, 156:10, 157:9
Lowman's [9] - 10:1, 13:10, 14:11, 28:17, 39:13, 44:1, 51:23, 52:23, 68:20
LTD [1] - 2:5

M

Machines [1] - 172:20
Magistrate [5] - 91:21, 116:7, 118:18, 120:3, 124:13

Hawkins Reporting Service

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(302) 658-6697 EMAIL: Dalehrs@aol.com

<p>magistrate [6] - 110:7, 124:19, 124:22, 132:4, 176:23, 179:24</p> <p>main [1] - 210:14</p> <p>majority [2] - 139:8, 141:13</p> <p>manage [1] - 199:24</p> <p>managed [1] - 86:13</p> <p>manner [1] - 138:15</p> <p>March [1] - 78:23</p> <p>market [4] - 101:6, 101:11, 104:16, 112:12</p> <p>marketing [2] - 164:6, 170:9</p> <p>marks [1] - 143:15</p> <p>Maserati [3] - 35:9, 35:11, 35:12</p> <p>match [12] - 10:17, 11:10, 12:8, 12:11, 14:1, 20:21, 24:23, 25:7, 25:19, 46:15, 156:22</p> <p>matched [1] - 25:22</p> <p>matching [14] - 8:17, 30:5, 37:1, 37:6, 37:10, 37:17, 37:19, 39:3, 39:14, 42:3, 46:6, 51:8, 156:19</p> <p>material [4] - 30:14, 120:16, 170:2, 183:19</p> <p>materials [4] - 17:10, 52:1, 53:4, 190:5</p> <p>matter [11] - 5:21, 56:6, 76:2, 81:10, 95:2, 95:13, 119:23, 180:4, 192:1, 203:4, 212:12</p> <p>Mays [16] - 18:16, 45:19, 99:4, 99:10, 106:8, 108:8, 108:20, 109:5, 117:21, 118:7, 119:1, 127:4, 127:5, 181:1, 185:10, 190:3</p> <p>Mays' [9] - 38:16, 39:16, 60:18, 62:17, 68:20, 106:3, 128:13, 181:9, 181:16</p> <p>mean [33] - 8:12, 13:3, 16:11, 21:11, 31:6, 35:4, 39:11, 54:2, 54:13, 60:21, 61:15, 61:23, 64:23, 69:21, 72:11, 75:9, 85:17, 118:10, 119:6, 121:21, 124:19, 127:11, 127:13, 127:15, 128:20, 142:13, 149:10, 153:10, 155:7, 167:17, 187:2, 191:16, 202:12</p> <p>meaning [3] - 84:12, 92:17, 127:14</p> <p>means [18] - 9:7, 32:2, 61:2, 61:7, 61:20, 64:21, 67:9, 69:23, 70:4, 75:7, 107:15, 107:19, 119:4, 122:19, 124:22, 129:23, 174:16, 193:17</p> <p>meant [8] - 42:9, 42:10, 58:4, 60:23, 67:8, 125:23, 127:14, 157:5</p> <p>meantime [1] - 134:23</p> <p>measure [2] - 118:5, 122:8</p> <p>measured [1] - 117:8</p> <p>measurement [3] - 120:12, 120:14, 121:10</p> <p>measures [1] - 122:9</p> <p>measuring [1] - 117:18</p> <p>mechanics [1] - 5:2</p> <p>mechanism [1] - 155:19</p> <p>mediation [1] - 143:17</p> <p>MEDICAL [1] - 1:9</p> <p>meet [15] - 28:21, 29:18, 76:10, 107:20, 121:11, 126:4, 126:5, 131:11, 155:16, 156:24, 183:1, 196:19, 202:3, 204:17</p>	<p>208:20</p> <p>meeting [1] - 183:24</p> <p>meets [2] - 15:17, 126:24</p> <p>Memorial [1] - 211:7</p> <p>memorize [1] - 197:11</p> <p>memory [19] - 8:17, 10:18, 11:10, 12:13, 14:1, 24:23, 25:19, 30:5, 37:1, 37:6, 37:10, 37:17, 37:20, 39:4, 42:3, 46:6, 46:14, 51:8, 156:20</p> <p>mention [3] - 73:16, 73:17, 189:17</p> <p>mentioned [5] - 27:6, 163:8, 163:9, 164:12, 196:6</p> <p>Merit [1] - 212:7</p> <p>meritorious [2] - 41:16, 107:10</p> <p>merits [2] - 35:18, 99:2</p> <p>met [1] - 3:16</p> <p>method [1] - 73:23</p> <p>metric [2] - 117:16, 119:24</p> <p>metrics [2] - 31:18, 120:7</p> <p>Mettler [10] - 89:16, 138:6, 138:13, 138:22, 138:23, 139:18, 157:13, 165:6, 165:16, 165:23</p> <p>might [14] - 35:17, 70:24, 77:6, 79:2, 82:23, 94:9, 98:2, 143:2, 171:6, 174:14, 177:18, 177:19, 184:12, 201:23</p> <p>millimeter [6] - 17:19, 18:6, 19:14, 20:4, 20:13, 22:9</p> <p>millimeters [6] - 18:8, 22:1, 22:20, 23:9, 25:9, 25:16</p> <p>mind [5] - 37:11, 37:17, 129:12, 201:23, 204:20</p> <p>minded [1] - 133:6</p> <p>minimize [2] - 76:14, 209:22</p> <p>minimum [1] - 132:22</p> <p>minute [1] - 175:17</p> <p>mischaracterizing [1] - 14:11</p> <p>missing [1] - 25:11</p> <p>misunderstand [1] - 78:15</p> <p>misunderstood [1] - 11:20</p> <p>mix [5] - 116:13, 116:17, 117:3, 117:6, 120:20</p> <p>mixed [1] - 52:20</p> <p>mixing [8] - 52:5, 54:1, 54:10, 54:15, 54:21, 55:1, 56:19, 120:18</p> <p>mixture [2] - 18:18, 116:16</p> <p>modification [1] - 192:9</p> <p>moment [5] - 131:2, 148:18, 170:18, 173:23, 193:21</p> <p>month [6] - 143:7, 143:21, 144:3, 175:24, 176:4, 189:14</p> <p>months [3] - 19:23, 77:23, 143:12</p> <p>moot [2] - 139:2, 142:21</p> <p>mooted [1] - 145:7</p> <p>morning [16] - 3:1, 3:4, 3:6, 3:11, 3:12, 3:15, 3:24, 79:24, 131:10, 131:15, 137:14, 144:19, 184:19, 194:7, 194:11, 204:3</p> <p>MORRIS [1] - 2:11</p>	<p>most [6] - 4:22, 7:15, 55:5, 129:2, 175:4, 182:16</p> <p>mostly [2] - 37:15, 114:21</p> <p>motion [37] - 4:11, 4:15, 37:14, 38:14, 71:3, 78:10, 79:24, 85:3, 97:7, 97:14, 97:18, 97:21, 99:17, 100:5, 100:9, 100:23, 103:7, 106:14, 106:22, 107:1, 107:5, 108:3, 108:19, 124:13, 131:3, 131:19, 131:22, 186:23, 186:24, 187:1, 188:18, 189:5, 189:19, 189:21, 189:22, 190:6, 205:5</p> <p>motions [6] - 4:16, 78:2, 78:6, 156:13, 185:24, 203:3</p> <p>move [9] - 9:11, 50:22, 55:18, 79:3, 94:10, 97:13, 163:12, 180:6, 205:6</p> <p>moving [2] - 154:13, 184:13</p> <p>MR [298] - 3:12, 5:9, 5:12, 6:2, 6:5, 7:15, 7:24, 8:4, 8:23, 9:13, 9:16, 9:23, 10:7, 10:11, 11:3, 11:19, 12:3, 12:24, 14:8, 15:16, 16:1, 16:6, 16:15, 16:21, 17:8, 19:19, 20:1, 21:5, 21:10, 21:14, 22:18, 23:3, 23:6, 23:21, 24:3, 24:8, 24:19, 25:2, 25:14, 25:20, 26:3, 26:7, 26:14, 26:17, 27:1, 27:5, 27:17, 27:22, 28:12, 28:16, 29:3, 30:2, 30:10, 31:7, 32:11, 34:16, 35:20, 36:7, 36:20, 37:2, 37:5, 38:7, 40:12, 41:5, 41:20, 41:23, 42:8, 42:21, 43:6, 43:23, 44:5, 44:8, 47:10, 51:2, 51:5, 51:12, 51:21, 53:23, 55:8, 55:15, 55:23, 56:15, 57:1, 57:8, 58:13, 59:1, 59:15, 59:20, 60:2, 60:5, 60:9, 63:18, 64:6, 66:4, 67:5, 68:10, 70:16, 70:23, 71:7, 71:13, 73:3, 74:21, 77:5, 78:16, 79:4, 79:10, 79:15, 79:21, 80:1, 80:22, 81:11, 83:2, 84:2, 84:18, 84:23, 85:24, 87:7, 89:1, 89:8, 89:11, 90:16, 91:3, 92:5, 92:19, 92:24, 93:4, 93:9, 93:19, 94:2, 94:12, 94:24, 97:19, 98:8, 98:18, 99:23, 100:12, 100:21, 104:14, 105:2, 106:6, 106:15, 106:17, 106:24, 107:11, 108:5, 108:16, 109:8, 109:18, 110:18, 111:8, 111:15, 111:24, 113:7, 113:13, 114:2, 114:20, 116:3, 116:12, 122:3, 122:18, 122:24, 124:8, 124:12, 125:19, 126:11, 127:5, 127:13, 127:20, 127:23, 128:12, 129:9, 130:13, 130:16, 130:22, 131:4, 138:2, 138:21, 139:17, 139:23, 141:2, 141:19, 142:7, 142:11, 142:15, 143:6, 144:4, 144:12, 145:6, 145:11, 145:15, 146:2, 146:8, 146:12, 146:20, 146:24, 147:7, 147:10, 147:19, 148:2, 148:21, 149:18, 150:12, 151:4, 151:18, 151:21, 152:2, 153:9, 153:18, 154:24, 156:15, 157:7, 157:10, 157:16, 157:19, 158:4, 158:9, 159:15, 159:21, 160:5, 160:24, 161:4, 161:7, 161:12, 161:17, 162:2, 162:14, 162:22, 163:15, 163:18, 164:3, 165:1, 165:5, 166:3, 166:9, 166:13, 166:23, 167:7,</p>
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<p>167:11, 167:21, 168:6, 168:21, 169:24, 170:4, 171:15, 172:15, 173:5, 176:9, 176:11, 176:21, 177:11, 177:17, 177:24, 178:10, 178:17, 179:2, 179:5, 182:6, 182:19, 183:4, 183:16, 184:11, 190:9, 190:11, 190:21, 190:24, 191:20, 193:5, 193:8, 195:24, 196:2, 198:20, 198:22, 199:6, 199:14, 200:13, 200:15, 200:23, 201:12, 202:9, 202:10, 203:22, 203:23, 205:24, 206:1, 206:20, 206:21, 207:1, 207:3, 207:23, 208:2, 209:2, 209:7, 209:9, 210:13, 210:20, 211:3, 211:15, 211:19</p> <p>MS [2] - 3:4, 3:7</p> <p>multiple [4] - 20:22, 31:10, 163:4, 210:7</p> <p>must [12] - 10:13, 10:15, 10:17, 12:8, 12:11, 23:24, 24:16, 24:23, 26:23, 30:18, 37:9, 103:20</p>	<p>21:17, 23:7, 55:18, 60:20, 84:24, 93:8, 119:19, 137:2, 143:7, 143:21, 145:16, 185:19, 205:6</p> <p>nice [4] - 17:16, 17:17, 17:21, 17:22</p> <p>NICHOLS [1] - 2:11</p> <p>Nichols [1] - 3:13</p> <p>night [1] - 15:1</p> <p>nil [1] - 97:2</p> <p>nobody [3] - 156:3, 202:15, 202:17</p> <p>non [2] - 198:11, 203:13</p> <p>noncumulative [1] - 168:3</p> <p>none [3] - 9:8, 58:3, 70:11</p> <p>noninfringement [39] - 6:17, 7:1, 12:9, 12:10, 12:17, 12:22, 13:4, 15:20, 16:14, 16:20, 18:3, 23:12, 23:19, 24:2, 24:18, 25:1, 25:3, 25:13, 27:15, 28:5, 29:24, 30:7, 30:16, 32:6, 36:1, 36:4, 36:19, 36:21, 37:1, 45:4, 45:21, 46:13, 48:7, 48:11, 48:13, 48:18, 48:22, 49:3, 189:10</p> <p>nonmoving [2] - 80:7, 90:4</p> <p>nonvalid [1] - 103:19</p> <p>Notary [1] - 212:8</p> <p>notations [1] - 105:21</p> <p>note [2] - 150:19, 205:16</p> <p>noted [5] - 87:23, 102:7, 103:3, 128:3, 195:18</p> <p>notes [2] - 62:20, 212:11</p> <p>nothing [17] - 33:5, 35:10, 36:3, 45:7, 46:5, 46:14, 62:21, 62:23, 65:3, 69:4, 69:11, 95:22, 97:9, 102:5, 211:14, 211:15, 211:17</p> <p>notice [5] - 96:5, 111:21, 172:21, 192:12, 199:19</p> <p>November [15] - 97:9, 101:17, 103:15, 104:11, 110:16, 110:18, 110:19, 111:19, 113:8, 114:3, 114:22, 115:6, 134:19, 135:4, 188:6</p> <p>nucleophilic [1] - 179:19</p> <p>numb [1] - 123:4</p> <p>number [20] - 10:12, 10:13, 10:16, 11:5, 12:9, 48:14, 48:15, 93:10, 110:6, 111:5, 111:9, 127:6, 136:23, 137:13, 152:12, 171:22, 176:16, 195:8</p> <p>numbers [7] - 98:12, 102:5, 104:17, 105:11, 115:2, 122:11, 185:9</p> <p>numerous [2] - 126:7, 172:24</p>	<p>objecting [2] - 195:15, 203:14</p> <p>objection [15] - 54:12, 71:19, 121:24, 122:15, 162:19, 164:10, 191:13, 194:18, 194:19, 194:20, 196:17, 196:24, 197:2, 197:4, 197:6</p> <p>objectionable [1] - 203:13</p> <p>objections [32] - 4:19, 44:15, 49:11, 55:6, 55:20, 57:5, 115:22, 116:6, 134:10, 156:10, 175:15, 176:23, 177:15, 178:12, 179:8, 179:24, 184:7, 185:24, 189:9, 193:20, 194:4, 194:5, 194:11, 194:12, 194:15, 195:1, 195:12, 196:8, 196:21, 196:23, 197:14, 203:2</p> <p>objective [1] - 64:24</p> <p>obscured [1] - 18:24</p> <p>obscuring [1] - 154:9</p> <p>obscurity [1] - 19:1</p> <p>observable [26] - 8:12, 9:1, 9:6, 9:14, 13:18, 18:13, 18:15, 18:19, 19:2, 20:5, 20:9, 20:12, 25:6, 28:21, 31:13, 33:1, 34:18, 34:19, 38:11, 38:18, 39:1, 40:13, 45:10, 46:3, 154:8, 179:13</p> <p>observation [1] - 128:4</p> <p>observe [2] - 37:12, 57:14</p> <p>obstruct [1] - 188:13</p> <p>obtaining [1] - 168:8</p> <p>obvious [8] - 31:3, 71:18, 75:17, 96:21, 141:23, 181:4, 181:5</p> <p>obviously [6] - 30:24, 49:4, 54:21, 130:8, 202:24, 203:11</p> <p>obviousness [7] - 74:8, 74:12, 88:13, 88:15, 141:22, 150:9, 151:16</p> <p>occur [2] - 21:6, 21:24</p> <p>occurred [2] - 128:6, 175:24</p> <p>occurring [2] - 21:9, 21:11</p> <p>occurs [1] - 52:21</p> <p>odd [1] - 173:12</p> <p>odds [5] - 92:8, 92:11, 136:3, 136:11, 137:5</p> <p>OF [2] - 1:2, 212:5</p> <p>offer [15] - 5:18, 5:23, 16:18, 23:18, 24:1, 24:6, 26:6, 28:9, 36:24, 41:3, 59:17, 111:6, 113:11, 195:3, 195:7</p> <p>offered [10] - 27:15, 36:4, 48:10, 48:12, 70:21, 79:5, 107:6, 180:10, 180:18, 193:15</p> <p>offering [8] - 24:4, 27:14, 27:20, 27:21, 35:23, 41:6, 69:11, 184:16</p> <p>offhand [1] - 137:20</p> <p>office [6] - 71:18, 74:5, 74:8, 74:24, 75:10, 75:16</p> <p>officers [2] - 199:23, 207:6</p> <p>often [2] - 170:16, 198:10</p> <p>old [2] - 105:21, 141:7</p> <p>once [20] - 25:22, 30:20, 94:12, 112:13, 120:21, 120:24, 186:10, 193:14, 195:5, 196:20, 198:5, 200:5, 200:6, 204:9, 204:22, 205:3, 205:7, 210:8</p> <p>one [137] - 6:11, 6:23, 7:16, 8:3, 8:19,</p>
N		
<p>name [2] - 161:9, 173:6</p> <p>named [1] - 172:8</p> <p>narrow [8] - 14:16, 39:23, 42:17, 42:24, 50:15, 154:16, 155:17</p> <p>narrowed [8] - 14:20, 22:16, 23:11, 23:13, 40:22, 44:11, 44:12, 150:24</p> <p>narrower [4] - 40:19, 42:18, 43:11</p> <p>narrowing [2] - 22:20, 196:7</p> <p>narrows [1] - 11:23</p> <p>nature [1] - 167:19</p> <p>nauseam [1] - 208:13</p> <p>necessarily [8] - 16:12, 39:3, 39:16, 45:22, 52:21, 100:14, 148:4, 154:14</p> <p>necessary [8] - 16:2, 106:22, 160:17, 169:20, 199:5, 200:1, 205:1, 207:21</p> <p>need [52] - 8:20, 10:10, 11:8, 11:10, 20:8, 22:10, 38:8, 39:3, 40:3, 54:5, 57:11, 61:7, 76:24, 77:20, 78:2, 79:1, 80:2, 109:7, 119:10, 122:1, 122:16, 142:20, 145:5, 151:17, 151:23, 160:20, 162:1, 163:12, 164:19, 178:15, 182:21, 184:19, 184:24, 185:1, 185:3, 185:23, 186:9, 186:11, 193:4, 193:19, 195:7, 196:13, 197:20, 198:4, 201:8, 203:7, 204:3, 204:8, 206:3, 206:10, 206:17, 210:12</p> <p>needs [1] - 22:9</p> <p>network [1] - 116:24</p> <p>Networks [1] - 84:15</p> <p>never [15] - 85:19, 92:15, 96:20, 97:3, 98:12, 102:18, 105:21, 115:8, 147:13, 147:14, 158:18, 158:24, 159:2, 160:10, 161:10</p> <p>new [8] - 87:16, 92:2, 101:14, 101:16, 105:17, 160:10, 160:17, 168:19</p> <p>New [2] - 85:5, 212:2</p> <p>next [18] - 20:2, 20:3, 20:5, 21:16,</p>	<p>nonmoving [2] - 80:7, 90:4</p> <p>nonvalid [1] - 103:19</p> <p>Notary [1] - 212:8</p> <p>notations [1] - 105:21</p> <p>note [2] - 150:19, 205:16</p> <p>noted [5] - 87:23, 102:7, 103:3, 128:3, 195:18</p> <p>notes [2] - 62:20, 212:11</p> <p>nothing [17] - 33:5, 35:10, 36:3, 45:7, 46:5, 46:14, 62:21, 62:23, 65:3, 69:4, 69:11, 95:22, 97:9, 102:5, 211:14, 211:15, 211:17</p> <p>notice [5] - 96:5, 111:21, 172:21, 192:12, 199:19</p> <p>November [15] - 97:9, 101:17, 103:15, 104:11, 110:16, 110:18, 110:19, 111:19, 113:8, 114:3, 114:22, 115:6, 134:19, 135:4, 188:6</p> <p>nucleophilic [1] - 179:19</p> <p>numb [1] - 123:4</p> <p>number [20] - 10:12, 10:13, 10:16, 11:5, 12:9, 48:14, 48:15, 93:10, 110:6, 111:5, 111:9, 127:6, 136:23, 137:13, 152:12, 171:22, 176:16, 195:8</p> <p>numbers [7] - 98:12, 102:5, 104:17, 105:11, 115:2, 122:11, 185:9</p> <p>numerous [2] - 126:7, 172:24</p>	<p>objecting [2] - 195:15, 203:14</p> <p>objection [15] - 54:12, 71:19, 121:24, 122:15, 162:19, 164:10, 191:13, 194:18, 194:19, 194:20, 196:17, 196:24, 197:2, 197:4, 197:6</p> <p>objectionable [1] - 203:13</p> <p>objections [32] - 4:19, 44:15, 49:11, 55:6, 55:20, 57:5, 115:22, 116:6, 134:10, 156:10, 175:15, 176:23, 177:15, 178:12, 179:8, 179:24, 184:7, 185:24, 189:9, 193:20, 194:4, 194:5, 194:11, 194:12, 194:15, 195:1, 195:12, 196:8, 196:21, 196:23, 197:14, 203:2</p> <p>objective [1] - 64:24</p> <p>obscured [1] - 18:24</p> <p>obscuring [1] - 154:9</p> <p>obscurity [1] - 19:1</p> <p>observable [26] - 8:12, 9:1, 9:6, 9:14, 13:18, 18:13, 18:15, 18:19, 19:2, 20:5, 20:9, 20:12, 25:6, 28:21, 31:13, 33:1, 34:18, 34:19, 38:11, 38:18, 39:1, 40:13, 45:10, 46:3, 154:8, 179:13</p> <p>observation [1] - 128:4</p> <p>observe [2] - 37:12, 57:14</p> <p>obstruct [1] - 188:13</p> <p>obtaining [1] - 168:8</p> <p>obvious [8] - 31:3, 71:18, 75:17, 96:21, 141:23, 181:4, 181:5</p> <p>obviously [6] - 30:24, 49:4, 54:21, 130:8, 202:24, 203:11</p> <p>obviousness [7] - 74:8, 74:12, 88:13, 88:15, 141:22, 150:9, 151:16</p> <p>occur [2] - 21:6, 21:24</p> <p>occurred [2] - 128:6, 175:24</p> <p>occurring [2] - 21:9, 21:11</p> <p>occurs [1] - 52:21</p> <p>odd [1] - 173:12</p> <p>odds [5] - 92:8, 92:11, 136:3, 136:11, 137:5</p> <p>OF [2] - 1:2, 212:5</p> <p>offer [15] - 5:18, 5:23, 16:18, 23:18, 24:1, 24:6, 26:6, 28:9, 36:24, 41:3, 59:17, 111:6, 113:11, 195:3, 195:7</p> <p>offered [10] - 27:15, 36:4, 48:10, 48:12, 70:21, 79:5, 107:6, 180:10, 180:18, 193:15</p> <p>offering [8] - 24:4, 27:14, 27:20, 27:21, 35:23, 41:6, 69:11, 184:16</p> <p>offhand [1] - 137:20</p> <p>office [6] - 71:18, 74:5, 74:8, 74:24, 75:10, 75:16</p> <p>officers [2] - 199:23, 207:6</p> <p>often [2] - 170:16, 198:10</p> <p>old [2] - 105:21, 141:7</p> <p>once [20] - 25:22, 30:20, 94:12, 112:13, 120:21, 120:24, 186:10, 193:14, 195:5, 196:20, 198:5, 200:5, 200:6, 204:9, 204:22, 205:3, 205:7, 210:8</p> <p>one [137] - 6:11, 6:23, 7:16, 8:3, 8:19,</p>
O		
<p>o'clock [5] - 131:12, 144:8, 144:15, 164:20, 165:15</p> <p>oath [2] - 140:18, 140:19</p> <p>object [16] - 28:7, 49:13, 50:13, 56:20, 71:1, 73:2, 106:3, 109:5, 138:19, 158:7, 164:2, 167:14, 187:5, 195:10, 195:11, 195:12</p> <p>objected [4] - 157:12, 193:12, 193:18, 195:14</p>	<p>o'clock [5] - 131:12, 144:8, 144:15, 164:20, 165:15</p> <p>oath [2] - 140:18, 140:19</p> <p>object [16] - 28:7, 49:13, 50:13, 56:20, 71:1, 73:2, 106:3, 109:5, 138:19, 158:7, 164:2, 167:14, 187:5, 195:10, 195:11, 195:12</p> <p>objected [4] - 157:12, 193:12, 193:18, 195:14</p>	<p>objecting [2] - 195:15, 203:14</p> <p>objection [15] - 54:12, 71:19, 121:24, 122:15, 162:19, 164:10, 191:13, 194:18, 194:19, 194:20, 196:17, 196:24, 197:2, 197:4, 197:6</p> <p>objectionable [1] - 203:13</p> <p>objections [32] - 4:19, 44:15, 49:11, 55:6, 55:20, 57:5, 115:22, 116:6, 134:10, 156:10, 175:15, 176:23, 177:15, 178:12, 179:8, 179:24, 184:7, 185:24, 189:9, 193:20, 194:4, 194:5, 194:11, 194:12, 194:15, 195:1, 195:12, 196:8, 196:21, 196:23, 197:14, 203:2</p> <p>objective [1] - 64:24</p> <p>obscured [1] - 18:24</p> <p>obscuring [1] - 154:9</p> <p>obscurity [1] - 19:1</p> <p>observable [26] - 8:12, 9:1, 9:6, 9:14, 13:18, 18:13, 18:15, 18:19, 19:2, 20:5, 20:9, 20:12, 25:6, 28:21, 31:13, 33:1, 34:18, 34:19, 38:11, 38:18, 39:1, 40:13, 45:10, 46:3, 154:8, 179:13</p> <p>observation [1] - 128:4</p> <p>observe [2] - 37:12, 57:14</p> <p>obstruct [1] - 188:13</p> <p>obtaining [1] - 168:8</p> <p>obvious [8] - 31:3, 71:18, 75:17, 96:21, 141:23, 181:4, 181:5</p> <p>obviously [6] - 30:24, 49:4, 54:21, 130:8, 202:24, 203:11</p> <p>obviousness [7] - 74:8, 74:12, 88:13, 88:15, 141:22, 150:9, 151:16</p> <p>occur [2] - 21:6, 21:24</p> <p>occurred [2] - 128:6, 175:24</p> <p>occurring [2] - 21:9, 21:11</p> <p>occurs [1] - 52:21</p> <p>odd [1] - 173:12</p> <p>odds [5] - 92:8, 92:11, 136:3, 136:11, 137:5</p> <p>OF [2] - 1:2, 212:5</p> <p>offer [15] - 5:18, 5:23, 16:18, 23:18, 24:1, 24:6, 26:6, 28:9, 36:24, 41:3, 59:17, 111:6, 113:11, 195:3, 195:7</p> <p>offered [10] - 27:15, 36:4, 48:10, 48:12, 70:21, 79:5, 107:6, 180:10, 180:18, 193:15</p> <p>offering [8] - 24:4, 27:14, 27:20, 27:21, 35:23, 41:6, 69:11, 184:16</p> <p>offhand [1] - 137:20</p> <p>office [6] - 71:18, 74:5, 74:8, 74:24, 75:10, 75:16</p> <p>officers [2] - 199:23, 207:6</p> <p>often [2] - 170:16, 198:10</p> <p>old [2] - 105:21, 141:7</p> <p>once [20] - 25:22, 30:20, 94:12, 112:13, 120:21, 120:24, 186:10, 193:14, 195:5, 196:20, 198:5, 200:5, 200:6, 204:9, 204:22, 205:3, 205:7, 210:8</p> <p>one [137] - 6:11, 6:23, 7:16, 8:3, 8:19,</p>

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<p>9:7, 10:2, 10:5, 10:12, 12:9, 13:11, 13:20, 13:22, 14:4, 16:7, 17:1, 17:19, 18:5, 18:7, 19:14, 20:4, 20:13, 21:14, 21:15, 22:8, 22:20, 23:9, 25:8, 25:16, 26:5, 26:11, 27:6, 28:17, 29:10, 29:14, 30:5, 31:20, 35:14, 36:10, 36:22, 37:7, 39:17, 43:7, 44:9, 48:9, 49:20, 50:1, 50:5, 51:3, 53:14, 56:22, 57:16, 57:17, 59:2, 59:12, 60:10, 61:6, 61:13, 64:23, 66:14, 66:15, 68:22, 69:2, 69:5, 70:1, 71:23, 74:3, 75:2, 76:7, 78:22, 79:2, 79:15, 80:3, 81:2, 84:5, 86:2, 88:9, 91:13, 91:18, 95:3, 96:6, 102:19, 105:14, 108:20, 110:23, 112:7, 116:4, 117:11, 119:23, 120:9, 120:13, 120:16, 121:4, 121:5, 122:7, 124:17, 125:13, 127:6, 127:24, 128:17, 130:9, 131:15, 132:9, 134:2, 134:13, 136:24, 138:2, 138:16, 139:1, 139:19, 140:23, 141:24, 155:21, 158:10, 158:11, 161:4, 161:23, 166:21, 168:9, 168:14, 168:22, 172:8, 180:14, 184:4, 184:11, 187:24, 193:24, 196:23, 199:23, 202:20, 204:21, 205:6, 207:4, 209:9</p> <p>ones [7] - 45:15, 55:6, 77:17, 137:19, 172:7, 180:12, 182:8</p> <p>open [5] - 5:1, 93:15, 133:6, 134:9, 200:5</p> <p>opening [3] - 60:18, 128:15, 199:24</p> <p>openings [1] - 202:24</p> <p>operation [1] - 193:13</p> <p>operative [2] - 105:22, 124:20</p> <p>opine [2] - 28:8, 40:3</p> <p>opined [2] - 45:3, 114:1</p> <p>opining [4] - 12:5, 13:4, 14:18, 15:14</p> <p>opinion [78] - 6:13, 7:18, 8:22, 9:5, 13:12, 13:20, 16:14, 21:4, 24:7, 24:18, 26:22, 33:21, 37:8, 37:9, 37:16, 37:19, 40:20, 41:24, 42:2, 42:6, 43:24, 45:19, 46:2, 47:14, 47:22, 48:3, 51:24, 53:11, 53:12, 55:21, 61:20, 99:5, 99:21, 100:1, 100:19, 101:13, 101:14, 102:3, 102:20, 102:21, 102:22, 103:3, 103:12, 104:5, 104:9, 104:10, 104:11, 104:15, 104:24, 106:4, 106:9, 106:12, 107:18, 108:8, 108:23, 108:24, 109:2, 109:21, 110:12, 110:13, 110:16, 110:19, 111:12, 111:19, 112:3, 113:11, 115:12, 184:16, 186:4, 187:7, 187:10, 187:13, 187:17, 188:9, 188:20, 190:13</p> <p>opinions [49] - 4:9, 7:1, 8:24, 9:24, 12:22, 13:8, 13:21, 19:13, 26:6, 26:15, 27:6, 34:15, 36:4, 36:9, 36:17, 36:19, 39:22, 40:21, 45:9, 46:24, 47:18, 49:14, 62:3, 65:20, 68:11, 68:15, 69:11, 70:19, 98:22, 99:8, 100:16, 101:3, 101:18, 101:19, 102:5, 102:16, 105:14, 107:14, 110:17, 163:3, 180:10, 181:5, 181:12, 182:2, 185:8,</p>	<p>185:9, 185:16, 187:22, 188:3</p> <p>opportunity [5] - 102:16, 159:13, 170:7, 187:24, 189:19</p> <p>oppose [10] - 93:24, 97:17, 97:21, 99:16, 99:22, 100:11, 100:12, 100:20, 100:23, 201:15</p> <p>opposed [1] - 43:20</p> <p>option [1] - 79:2</p> <p>order [46] - 4:1, 4:24, 5:2, 6:6, 6:20, 8:5, 10:22, 10:24, 12:14, 15:23, 23:17, 28:7, 28:21, 30:17, 32:2, 32:17, 38:6, 40:23, 47:12, 48:11, 51:6, 57:11, 76:10, 87:18, 91:24, 108:23, 119:11, 120:3, 138:4, 139:12, 141:11, 144:23, 145:3, 156:14, 186:12, 189:12, 189:15, 191:23, 192:3, 192:9, 193:14, 193:18, 194:3, 196:6, 200:18, 210:12</p> <p>ordered [1] - 186:11</p> <p>orderly [1] - 188:13</p> <p>orders [1] - 150:16</p> <p>ordinary [7] - 14:4, 35:15, 61:6, 61:13, 68:22, 69:5, 70:1</p> <p>organization [1] - 172:22</p> <p>original [5] - 102:13, 105:6, 105:16, 190:22, 191:1</p> <p>originally [1] - 60:14</p> <p>otherwise [3] - 44:1, 133:21, 164:15</p> <p>ought [1] - 73:7</p> <p>outcome [1] - 75:6</p> <p>outlined [1] - 143:14</p> <p>outside [17] - 20:15, 20:16, 50:9, 50:14, 101:9, 102:4, 102:10, 102:21, 105:12, 109:24, 111:10, 113:1, 115:14, 115:19, 149:22, 155:6, 194:16</p> <p>outsized [1] - 150:22</p> <p>outstanding [1] - 176:17</p> <p>outweighs [1] - 173:18</p> <p>overall [1] - 188:19</p> <p>overlap [1] - 201:6</p> <p>overlapping [1] - 183:17</p> <p>overlaps [1] - 72:6</p> <p>overlook [1] - 211:13</p> <p>overnight [1] - 201:21</p> <p>overreach [1] - 7:4</p> <p>overrule [1] - 179:23</p> <p>overruling [1] - 179:7</p> <p>overview [3] - 98:15, 98:17, 204:1</p> <p>own [8] - 13:3, 73:21, 117:10, 123:1, 125:3, 126:11, 128:7, 167:23</p> <p>owner [1] - 96:2</p>	<p>paid [2] - 91:13, 187:8</p> <p>paint [2] - 156:20, 156:21</p> <p>paper [2] - 109:11</p> <p>paragraph [11] - 62:24, 105:5, 110:19, 111:6, 111:20, 114:3, 115:1, 115:3, 115:17, 128:18, 185:9</p> <p>paragraphs [5] - 9:4, 12:5, 32:11, 33:2, 70:11</p> <p>Parallel [1] - 84:15</p> <p>parameters [1] - 199:19</p> <p>paraphrasing [1] - 24:12</p> <p>part [55] - 7:16, 15:19, 16:12, 24:17, 24:24, 25:2, 25:10, 26:24, 27:2, 27:13, 28:4, 28:6, 29:10, 29:12, 29:23, 29:24, 30:6, 30:8, 30:15, 32:6, 32:17, 42:19, 43:5, 45:1, 47:21, 56:19, 56:20, 60:6, 61:9, 63:20, 64:18, 83:10, 84:4, 86:10, 90:6, 94:10, 99:16, 100:19, 106:4, 107:1, 121:12, 127:6, 133:23, 155:23, 159:11, 159:14, 159:16, 178:18, 183:12, 187:1, 187:3, 194:22, 205:22</p> <p>partes [2] - 83:5, 83:16</p> <p>particular [23] - 8:24, 10:2, 12:6, 14:21, 20:14, 20:21, 43:14, 46:18, 47:13, 48:1, 49:17, 50:13, 59:5, 67:14, 74:6, 134:18, 141:24, 162:4, 172:7, 173:15, 191:17, 192:3, 194:12</p> <p>particularly [6] - 9:4, 77:8, 77:14, 143:9, 187:15, 199:10</p> <p>parties [14] - 6:9, 50:12, 56:2, 87:16, 90:6, 93:9, 95:13, 132:9, 134:3, 134:17, 155:16, 165:24, 189:15, 192:2</p> <p>parties' [1] - 38:13</p> <p>partner [1] - 3:14</p> <p>parts [3] - 84:2, 113:15, 116:24</p> <p>party [9] - 80:7, 83:8, 84:13, 90:4, 173:13, 194:17, 197:1, 207:8</p> <p>PASCALE [3] - 2:3, 3:4, 3:7</p> <p>Pascale [2] - 3:7, 71:9</p> <p>pass [1] - 82:23</p> <p>passing [1] - 205:14</p> <p>paste [1] - 153:12</p> <p>patent [59] - 4:13, 4:21, 7:19, 26:11, 35:4, 66:10, 71:5, 71:18, 72:3, 72:21, 74:5, 74:7, 74:23, 74:24, 75:10, 75:16, 80:15, 81:24, 83:6, 83:20, 86:13, 86:23, 87:13, 87:15, 88:7, 93:17, 94:13, 96:2, 98:23, 99:6, 99:8, 107:22, 108:9, 114:7, 115:24, 124:18, 131:21, 136:16, 137:10, 137:16, 139:6, 141:23, 142:6, 142:12, 142:16, 145:21, 146:1, 146:19, 168:9, 171:23, 176:15, 181:16, 181:19, 186:9, 189:7, 189:10</p> <p>Patent [1] - 126:15</p> <p>patentable [2] - 85:21, 132:3</p> <p>patents [12] - 64:11, 75:15, 78:19, 82:5, 82:6, 91:12, 93:20, 94:15, 107:17, 109:3, 171:8, 171:24</p> <p>patents-in-suit [2] - 91:12, 171:24</p>
<p style="text-align: center;">P</p>		

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<p>patient [12] - 60:14, 61:23, 62:1, 62:11, 63:19, 67:2, 67:8, 68:14, 68:19, 68:24, 69:8, 185:13</p> <p>patients [1] - 64:22</p> <p>pedantic [1] - 118:11</p> <p>pending [13] - 54:12, 54:20, 56:16, 57:5, 71:18, 75:2, 85:2, 85:5, 85:6, 89:17, 176:22, 177:5, 185:24</p> <p>Pennypack [5] - 169:23, 171:10, 171:16, 173:19, 187:11</p> <p>people [4] - 141:7, 165:7, 165:8, 210:14</p> <p>per [7] - 198:5, 200:6, 200:7, 200:18, 200:20, 203:7</p> <p>percent [4] - 101:24, 102:4, 113:2, 115:13</p> <p>percentage [4] - 104:17, 104:18, 104:20, 203:7</p> <p>percentages [1] - 203:10</p> <p>percipient [1] - 164:9</p> <p>perform [1] - 13:24</p> <p>performed [2] - 33:4, 73:23</p> <p>perhaps [5] - 42:23, 55:5, 56:12, 79:13, 132:8</p> <p>period [3] - 141:8, 160:19, 179:21</p> <p>permanent [3] - 77:20, 78:10, 97:3</p> <p>permit [1] - 170:18</p> <p>permitted [4] - 156:18, 158:17, 187:9, 190:4</p> <p>person [5] - 123:9, 138:24, 166:22, 169:15, 198:16</p> <p>personal [2] - 160:16, 168:16</p> <p>personnel [1] - 140:9</p> <p>perspective [4] - 54:14, 54:20, 65:23, 66:6</p> <p>persuade [1] - 135:2</p> <p>persuaded [9] - 47:13, 47:17, 50:3, 50:18, 132:21, 133:15, 134:20, 155:24, 175:4</p> <p>pertinent [2] - 41:14, 184:9</p> <p>petition [4] - 79:8, 84:15, 85:12, 96:2</p> <p>petitioner [5] - 83:5, 83:9, 83:14, 85:16, 86:2</p> <p>petitioners [1] - 142:1</p> <p>Pharmaceuticals [1] - 85:4</p> <p>phase [1] - 60:20</p> <p>phrase [2] - 61:10, 153:11</p> <p>phrased [1] - 24:10</p> <p>pick [3] - 35:18, 121:9, 156:20</p> <p>picture [1] - 116:4</p> <p>pictures [2] - 57:2, 123:10</p> <p>piece [5] - 46:18, 74:13, 109:10, 109:11, 170:23</p> <p>pink [1] - 154:10</p> <p>PIVOVAR [76] - 2:15, 6:2, 6:5, 14:8, 15:16, 16:1, 16:6, 16:15, 16:21, 17:8, 19:19, 20:1, 21:5, 21:10, 21:14, 22:18, 23:3, 23:6, 23:21, 24:3, 24:8, 24:19, 25:2, 25:14, 25:20, 26:3, 26:7, 26:14, 26:17, 27:1, 27:5, 27:17, 27:22, 28:12, 29:3, 30:10, 31:7, 32:11, 44:5, 44:8,</p>	<p>47:10, 53:23, 55:8, 55:15, 55:23, 56:15, 57:1, 59:1, 59:15, 59:20, 60:5, 63:18, 64:6, 66:4, 67:5, 70:16, 70:23, 116:3, 116:12, 122:3, 122:18, 122:24, 124:8, 127:20, 128:12, 129:9, 130:13, 130:16, 130:22, 145:6, 145:11, 157:10, 177:11, 177:17, 183:16, 184:11</p> <p>pIVOVAR [1] - 30:2</p> <p>Pivovar [2] - 3:17, 148:24</p> <p>place [1] - 140:20</p> <p>placed [1] - 62:9</p> <p>places [1] - 33:9</p> <p>plain [1] - 84:12</p> <p>plaintiff [39] - 5:8, 48:2, 48:9, 49:11, 50:19, 70:19, 74:24, 76:21, 79:24, 85:19, 85:22, 124:11, 127:22, 131:2, 134:21, 135:2, 135:13, 138:18, 141:1, 145:14, 158:16, 159:4, 162:12, 162:15, 170:21, 175:6, 175:9, 175:20, 176:2, 176:8, 182:4, 187:5, 187:16, 190:20, 191:10, 205:15, 206:23, 209:6, 211:14</p> <p>plaintiffs [20] - 4:15, 8:8, 23:15, 46:8, 68:11, 68:15, 97:14, 105:7, 117:10, 133:16, 144:24, 146:16, 154:12, 157:12, 174:1, 174:2, 184:17, 186:23, 189:4, 209:11</p> <p>Plaintiffs [2] - 1:7, 2:8</p> <p>plaintiffs [62] - 3:8, 5:16, 5:23, 7:4, 7:7, 14:10, 22:14, 23:1, 27:11, 32:5, 33:9, 33:21, 49:13, 50:23, 58:21, 72:1, 72:19, 73:14, 76:6, 76:12, 77:16, 78:18, 79:5, 89:21, 90:1, 99:4, 103:6, 103:17, 106:14, 107:24, 118:19, 128:14, 128:23, 136:5, 142:23, 143:10, 145:17, 147:2, 153:20, 154:20, 155:24, 156:9, 160:23, 173:16, 174:5, 175:5, 177:15, 179:1, 184:15, 185:18, 187:21, 188:7, 188:15, 188:21, 188:24, 189:17, 193:2, 195:23, 198:19, 200:22, 201:5, 210:1</p> <p>plan [5] - 4:1, 73:19, 159:17, 206:10, 207:9</p> <p>planning [1] - 209:21</p> <p>play [8] - 64:19, 119:18, 181:6, 189:8, 203:6, 203:9, 207:20, 207:21</p> <p>player [1] - 112:12</p> <p>playing [1] - 196:20</p> <p>plays [1] - 123:3</p> <p>plus [1] - 154:1</p> <p>podium [3] - 51:4, 147:8, 165:3</p> <p>point [61] - 18:12, 20:11, 24:13, 39:7, 39:8, 41:2, 45:6, 46:18, 50:2, 50:4, 50:18, 54:16, 58:24, 74:18, 77:19, 78:9, 83:3, 87:2, 87:6, 88:10, 96:1, 105:3, 105:4, 106:21, 109:6, 116:21, 117:4, 117:5, 117:10, 117:16, 118:19, 126:10, 129:12, 129:21, 129:22,</p>	<p>130:1, 130:18, 132:11, 133:15, 136:1, 142:16, 143:4, 147:5, 150:4, 162:1, 166:2, 172:1, 172:14, 173:11, 174:3, 174:13, 177:2, 177:4, 177:6, 184:20, 185:23, 192:6, 192:18, 193:16, 195:2, 199:13</p> <p>pointed [3] - 45:18, 67:21, 148:24</p> <p>pointing [2] - 45:10, 56:8</p> <p>points [9] - 48:18, 50:1, 50:5, 51:19, 88:10, 95:5, 120:6, 168:22, 172:4</p> <p>polarize [1] - 125:6</p> <p>polymerization [3] - 125:8, 125:9, 125:12</p> <p>pool [4] - 98:6, 204:6, 204:9, 205:9</p> <p>portion [7] - 127:11, 150:21, 186:17, 186:24, 187:6, 187:19, 191:19</p> <p>portions [4] - 36:15, 181:8, 199:1, 200:3</p> <p>position [30] - 10:13, 12:17, 14:11, 20:24, 39:9, 43:13, 51:22, 52:10, 53:1, 53:9, 53:18, 75:1, 75:7, 75:9, 77:4, 85:19, 95:17, 97:17, 114:12, 114:13, 122:4, 137:20, 145:17, 146:16, 155:12, 156:17, 170:9, 180:20, 183:3, 183:10</p> <p>positions [10] - 12:10, 13:5, 53:24, 144:19, 147:12, 148:5, 152:9, 181:1, 181:2, 201:20</p> <p>possess [1] - 43:1</p> <p>possibility [6] - 14:20, 75:22, 75:24, 76:15, 94:8, 136:18</p> <p>possible [4] - 76:3, 139:2, 142:2, 201:22</p> <p>possibly [2] - 74:13, 200:2</p> <p>postponed [1] - 138:13</p> <p>potential [4] - 71:20, 95:5, 204:19, 205:10</p> <p>potentially [1] - 14:16</p> <p>practical [1] - 95:12</p> <p>practice [3] - 15:24, 16:11, 35:15</p> <p>practicing [1] - 40:8</p> <p>prayer [1] - 202:18</p> <p>preamble [1] - 67:15</p> <p>precedent [1] - 85:10</p> <p>precisely [1] - 105:23</p> <p>precision [2] - 8:6, 8:7</p> <p>preclude [2] - 158:22, 170:22</p> <p>precluded [1] - 189:6</p> <p>precludes [1] - 85:8</p> <p>preclusion [1] - 171:11</p> <p>precursor [8] - 52:5, 52:19, 61:10, 63:12, 69:13, 69:16, 121:5</p> <p>precursors [9] - 53:14, 60:24, 61:5, 62:5, 63:7, 65:18, 65:19, 69:23, 116:14</p> <p>predetermined [65] - 6:17, 7:13, 7:23, 8:2, 8:11, 8:13, 9:2, 9:6, 9:12, 9:17, 10:19, 11:23, 12:12, 13:12, 13:19, 13:22, 15:4, 17:20, 18:6, 19:10, 19:14, 20:4, 20:6, 20:15, 20:17, 21:7, 22:5, 22:17, 22:19, 23:8, 25:4, 25:22, 28:22, 29:13, 30:20, 30:23, 31:16, 33:19,</p>
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<p>34:1, 34:6, 34:20, 38:10, 38:14, 39:2, 39:23, 40:16, 41:10, 45:15, 46:4, 72:5, 72:7, 73:5, 73:6, 80:24, 81:1, 81:3, 81:12, 81:20, 81:24, 148:22, 177:12, 177:14, 179:13, 179:14, 180:13</p> <p>predicated [1] - 154:14</p> <p>preemptory [1] - 205:12</p> <p>preference [3] - 146:14, 209:24, 210:5</p> <p>prejudice [21] - 76:15, 80:7, 89:6, 89:20, 90:1, 90:4, 90:5, 95:6, 96:23, 97:1, 134:16, 135:8, 160:9, 170:20, 170:21, 171:2, 173:11, 173:13, 173:14, 173:16, 175:1</p> <p>prejudiced [8] - 77:18, 112:17, 135:9, 135:10, 170:2, 173:17, 187:15, 187:23</p> <p>prejudicial [4] - 77:13, 156:1, 174:18, 175:5</p> <p>prejudicing [1] - 135:18</p> <p>preliminary [3] - 97:7, 202:16, 206:14</p> <p>preparation [3] - 140:2, 140:13, 152:20</p> <p>preparations [3] - 134:4, 140:20, 144:7</p> <p>prepare [2] - 143:13, 149:13</p> <p>prepared [4] - 48:24, 150:3, 158:10, 169:13</p> <p>prepares [1] - 77:10</p> <p>preparing [4] - 152:15, 155:22, 168:10, 169:15</p> <p>presence [3] - 193:22, 194:16, 205:4</p> <p>present [33] - 10:5, 10:10, 12:23, 46:23, 48:17, 55:22, 58:21, 73:19, 90:15, 95:13, 99:24, 100:16, 106:19, 136:4, 148:7, 148:13, 148:19, 149:16, 149:20, 149:24, 150:1, 150:6, 151:1, 152:1, 152:13, 154:15, 155:7, 156:4, 158:13, 177:16, 181:11, 186:4, 209:18</p> <p>presentation [2] - 133:20, 180:2</p> <p>presented [8] - 9:24, 108:17, 116:8, 140:16, 154:2, 180:20, 184:1, 184:12</p> <p>presenting [8] - 61:19, 70:2, 133:17, 139:4, 141:13, 150:7, 150:18, 160:15</p> <p>presents [1] - 132:11</p> <p>preserve [7] - 139:1, 139:12, 140:15, 141:11, 143:2, 143:4, 143:6</p> <p>preserved [1] - 103:2</p> <p>pressing [1] - 141:17</p> <p>presume [1] - 157:23</p> <p>presumed [1] - 175:12</p> <p>presumptive [1] - 181:23</p> <p>pretrial [16] - 3:21, 5:1, 76:10, 87:18, 138:4, 145:3, 150:13, 156:14, 189:12, 189:15, 191:23, 192:3, 193:14, 193:18, 194:3, 196:6</p> <p>pretty [9] - 3:23, 7:10, 24:13, 36:1, 57:1, 59:7, 107:5, 117:13, 202:12</p> <p>prevail [3] - 133:18, 134:22, 197:1</p> <p>prevailed [4] - 79:9, 135:12, 135:15, 135:16</p> <p>prevails [2] - 85:16, 197:4</p> <p>previous [1] - 24:4</p> <p>previously [3] - 49:15, 50:15, 197:3</p>	<p>price [27] - 97:23, 98:11, 99:20, 99:24, 100:1, 100:16, 101:7, 101:20, 103:8, 103:11, 103:24, 104:2, 104:6, 104:22, 105:8, 106:18, 106:21, 110:6, 110:11, 113:16, 114:11, 115:5, 115:8, 115:9, 115:13, 190:14, 191:4</p> <p>Priceline [1] - 172:21</p> <p>primarily [1] - 149:19</p> <p>primary [1] - 100:24</p> <p>prioritize [1] - 56:22</p> <p>priority [1] - 72:18</p> <p>privy [1] - 83:8</p> <p>problem [8] - 79:8, 100:24, 105:13, 105:23, 119:20, 191:7, 209:4, 210:9</p> <p>problematic [2] - 105:24, 117:22</p> <p>problems [1] - 166:14</p> <p>procedure [2] - 49:4, 143:16</p> <p>proceed [1] - 147:4</p> <p>proceeding [4] - 50:3, 83:11, 94:8, 153:14</p> <p>proceedings [6] - 4:12, 71:4, 77:10, 89:12, 131:20, 135:16</p> <p>proceeds [1] - 116:19</p> <p>process [6] - 76:11, 116:21, 123:23, 196:5, 202:15, 208:17</p> <p>produce [1] - 197:20</p> <p>produced [3] - 164:14, 172:10, 174:9</p> <p>product [10] - 17:2, 18:2, 25:12, 26:1, 91:16, 107:16, 123:6, 125:3, 125:10, 126:24</p> <p>production [2] - 172:18, 172:22</p> <p>products [12] - 31:15, 33:13, 45:11, 91:17, 107:19, 117:12, 118:24, 120:11, 121:19, 125:6, 126:5, 180:5</p> <p>profit [1] - 115:7</p> <p>profits [24] - 101:5, 101:7, 101:18, 101:22, 102:1, 102:9, 102:22, 103:4, 104:19, 110:21, 111:1, 111:3, 112:1, 112:2, 112:5, 112:11, 112:16, 114:14, 115:4, 115:5, 115:10, 115:12, 191:2, 191:3</p> <p>progress [1] - 188:13</p> <p>promise [1] - 93:24</p> <p>promote [1] - 89:19</p> <p>proper [5] - 132:12, 139:9, 148:11, 175:17, 200:10</p> <p>properly [4] - 97:24, 149:22, 159:5, 160:11</p> <p>propose [7] - 16:17, 49:1, 60:4, 122:23, 130:14, 160:13, 191:12</p> <p>proposed [8] - 50:1, 76:21, 130:16, 151:8, 151:9, 159:7, 192:6, 192:7</p> <p>proposing [2] - 48:21, 50:5</p> <p>proposition [1] - 141:21</p> <p>prosecution [4] - 81:23, 82:4, 82:7, 82:19</p> <p>prove [3] - 10:23, 10:24, 80:20</p> <p>provide [20] - 8:5, 8:7, 9:5, 13:2, 35:7, 37:16, 37:18, 41:24, 42:2, 42:5, 61:12, 109:20, 151:5, 151:13, 208:7</p>	<p>provided [10] - 4:4, 33:12, 62:17, 91:20, 102:5, 107:14, 107:17, 112:4, 190:6, 192:12</p> <p>provides [2] - 35:13, 37:9</p> <p>providing [3] - 37:8, 163:9, 196:15</p> <p>provision [1] - 74:16</p> <p>PTAB [17] - 76:23, 79:18, 85:21, 86:14, 87:5, 88:2, 88:10, 91:2, 96:3, 96:12, 132:2, 132:24, 133:18, 134:6, 134:24, 136:11, 136:17</p> <p>PTO [1] - 86:24</p> <p>Public [1] - 212:9</p> <p>public [1] - 135:5</p> <p>pull [1] - 153:19</p> <p>pulling [1] - 127:6</p> <p>pure [1] - 92:6</p> <p>purported [1] - 36:5</p> <p>purpose [3] - 75:14, 86:1, 169:10</p> <p>purposes [10] - 35:1, 36:19, 36:20, 41:15, 43:4, 47:20, 54:23, 70:2, 99:13, 160:3</p> <p>pursuant [1] - 139:3</p> <p>pursue [3] - 7:5, 105:8, 155:12</p> <p>push [1] - 144:3</p> <p>put [38] - 7:11, 15:11, 16:22, 27:24, 55:16, 55:17, 76:18, 91:9, 92:14, 95:19, 99:12, 101:14, 101:16, 104:4, 105:17, 107:1, 111:20, 112:18, 124:1, 124:3, 129:18, 132:17, 133:22, 158:2, 161:3, 161:24, 162:10, 164:16, 165:19, 168:14, 168:15, 169:10, 170:11, 172:21, 202:6, 204:5, 207:12, 207:13</p> <p>puts [3] - 17:20, 112:21, 163:24</p> <p>putting [7] - 3:2, 17:15, 64:10, 87:2, 88:9, 172:13, 197:15</p> <p style="text-align: center;">Q</p> <p>qualified [1] - 175:12</p> <p>questions [26] - 4:7, 5:8, 5:14, 47:2, 49:14, 76:14, 129:5, 144:10, 164:5, 167:19, 176:7, 176:10, 190:8, 190:10, 195:21, 198:18, 200:12, 200:14, 202:8, 203:20, 204:12, 204:13, 204:16, 204:21, 205:23, 206:19</p> <p>quickly [2] - 55:16, 161:6</p> <p>quite [8] - 8:10, 13:6, 69:5, 71:12, 76:15, 78:4, 170:22, 201:1</p> <p>quotation [1] - 15:7</p> <p>quotations [1] - 15:6</p> <p>quote [2] - 62:14, 70:12</p> <p style="text-align: center;">R</p> <p>R&R [17] - 4:19, 30:17, 32:2, 55:20, 56:13, 71:13, 71:19, 73:16, 77:9, 77:15, 115:23, 132:4, 133:2, 133:11,</p>
---	--	---

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(302) 658-6697 EMAIL: Dalehrs@aol.com

<p>178:12, 186:8, 189:9 R&Rs [1] - 130:9 raise [14] - 4:2, 4:3, 49:11, 84:8, 84:14, 88:11, 88:13, 88:14, 194:5, 194:10, 194:13, 204:14, 206:23, 209:6 raised [29] - 5:17, 32:16, 34:7, 83:14, 83:15, 84:9, 84:17, 84:19, 84:21, 84:23, 85:2, 85:11, 86:8, 86:16, 88:13, 97:23, 138:4, 139:7, 142:9, 144:9, 173:23, 178:4, 182:4, 182:5, 182:8, 208:16 raises [1] - 132:7 randomly [1] - 205:9 range [35] - 11:24, 19:15, 20:6, 20:14, 20:21, 21:22, 22:5, 22:9, 22:17, 22:19, 22:22, 23:10, 23:11, 23:13, 24:20, 25:5, 25:8, 25:15, 28:23, 29:14, 31:17, 31:19, 31:22, 41:2, 41:7, 41:9, 44:18, 44:21, 44:22, 45:16, 46:21, 46:22 ranges [1] - 14:17 ranging [1] - 125:8 rapid [1] - 125:12 rate [2] - 112:22, 112:24 reach [4] - 56:13, 108:23, 132:19, 183:20 reached [4] - 30:21, 37:12, 38:10, 41:10 react [4] - 116:15, 119:7, 119:8, 119:16 reacted [1] - 119:15 reacting [1] - 125:17 reaction [5] - 116:16, 116:18, 125:19, 125:21 reactive [2] - 52:5, 52:19 reacts [1] - 117:6 read [8] - 10:3, 28:17, 113:4, 192:11, 192:15, 202:16, 204:11, 204:16 reading [3] - 24:14, 28:3, 204:15 ready [5] - 59:24, 123:7, 131:18, 186:5, 205:20 reaffirm [1] - 102:16 real [4] - 18:11, 83:8, 97:22, 105:13 reality [1] - 134:5 really [26] - 6:6, 6:14, 17:3, 30:16, 38:4, 42:19, 43:1, 45:8, 55:16, 64:11, 66:13, 73:4, 80:14, 87:19, 95:4, 96:17, 118:13, 121:20, 126:19, 150:1, 158:15, 164:11, 173:8, 173:16, 175:4, 182:15 reargued [1] - 122:5 rearguing [1] - 119:9 reason [11] - 54:3, 66:14, 81:16, 88:5, 101:20, 106:7, 137:8, 139:20, 143:8, 153:9, 189:17 reasonable [47] - 38:15, 91:19, 98:10, 100:22, 101:8, 101:19, 102:2, 102:3, 102:6, 102:14, 102:20, 103:5, 103:9, 103:12, 103:21, 103:23, 104:5, 104:9, 104:14, 104:22, 109:22, 109:23, 109:24, 110:2, 110:7, 110:12, 110:17, 110:22, 111:4, 111:13, 111:22, 112:6, 112:7, 112:21, 112:22, 113:20, 114:6</p>	<p>114:10, 114:17, 115:5, 115:9, 115:13, 187:7, 187:22, 190:12, 208:7, 209:3 reasonably [7] - 83:15, 84:8, 84:13, 85:9, 167:18, 169:17, 194:8 rebuttal [10] - 62:18, 67:24, 94:23, 148:4, 181:5, 181:9, 181:10, 181:16, 181:21 rebutting [1] - 181:2 receive [4] - 102:9, 110:21, 112:1, 112:15 received [2] - 152:4, 193:13 recently [3] - 38:12, 55:5, 113:9 recess [5] - 130:24, 131:6, 131:7, 164:21, 211:21 recessed [1] - 211:22 recognize [4] - 134:1, 134:16, 136:14, 176:4 recognized [1] - 117:21 recommendation [7] - 80:16, 130:11, 176:24, 178:13, 179:8, 180:1, 189:13 recommended [1] - 55:11 recommending [1] - 132:5 reconciled [1] - 124:13 reconsider [2] - 100:9, 106:22 reconsideration [14] - 4:15, 96:3, 97:14, 99:17, 100:20, 100:24, 103:7, 106:2, 107:2, 107:10, 186:23, 189:1, 189:22, 191:18 record [10] - 3:3, 76:4, 95:17, 95:23, 99:13, 172:10, 195:7, 195:9, 200:9, 212:9 records [1] - 195:18 recover [1] - 189:1 recross [1] - 198:3 recross-examination [1] - 198:3 red [1] - 35:3 redirect [1] - 198:2 redo [4] - 67:16, 87:17, 87:18 reduce [1] - 75:24 reduced [1] - 18:23 refer [4] - 109:10, 169:18, 173:1, 184:18 reference [15] - 67:1, 74:5, 74:14, 74:15, 78:13, 84:6, 84:7, 112:19, 129:13, 139:5, 139:10, 141:18, 142:1, 142:3 referenced [5] - 58:8, 75:21, 85:10, 114:24, 174:10 references [7] - 74:12, 83:17, 84:5, 84:13, 85:8, 85:11, 174:7 regard [7] - 91:5, 109:21, 109:24, 142:17, 150:17, 171:16, 171:22 regarding [4] - 4:19, 38:14, 115:23, 143:12 regardless [3] - 88:1, 119:21, 137:7 regards [1] - 85:1 Registered [1] - 212:7 reiterate [1] - 88:8 rejected [2] - 65:22, 130:15 rejection [1] - 7:17 relate [6] - 55:6, 62:3, 138:7, 177:9,</p>	<p>related [27] - 4:20, 15:20, 19:13, 26:12, 56:9, 62:8, 82:5, 82:6, 82:7, 94:15, 98:22, 99:5, 99:8, 99:9, 116:10, 134:8, 135:5, 135:23, 137:22, 138:8, 176:14, 177:12, 180:13, 180:15, 181:15, 181:19, 186:8 relates [7] - 7:13, 7:22, 62:22, 70:11, 111:9, 138:4, 207:4 relative [2] - 31:8, 38:16 relatively [1] - 66:5 relaying [1] - 162:7 relevant [6] - 26:16, 26:17, 108:1, 174:14, 189:18, 189:24 relied [11] - 53:6, 105:11, 107:7, 108:8, 108:22, 109:6, 113:15, 116:7, 126:14, 128:14, 190:5 relief [8] - 8:7, 8:9, 34:14, 98:6, 135:3, 145:10, 155:15, 156:2 relies [2] - 15:3, 37:20 relieves [1] - 138:11 relitigating [1] - 75:8 rely [9] - 33:23, 106:9, 108:11, 111:4, 154:8, 169:17, 172:2, 180:11, 197:18 relying [5] - 13:7, 66:22, 99:5, 128:1, 187:21 remain [1] - 133:9 remainder [2] - 181:18, 198:7 remaining [4] - 144:20, 202:19, 204:8, 206:11 remains [2] - 61:5, 72:15 remanned [1] - 96:18 remarks [1] - 211:5 remember [3] - 120:17, 177:10, 191:1 remove [1] - 205:17 removed [1] - 157:23 removing [1] - 133:20 repeated [1] - 36:16 replaced [2] - 101:17, 102:2 reply [1] - 185:21 report [58] - 9:3, 13:10, 13:20, 15:7, 28:18, 29:1, 36:16, 37:14, 40:21, 60:19, 62:18, 62:19, 80:16, 99:2, 99:14, 100:3, 101:4, 101:16, 101:17, 102:13, 102:14, 103:14, 103:15, 104:15, 105:6, 105:9, 105:16, 105:18, 105:20, 105:21, 107:12, 111:17, 112:9, 112:10, 112:19, 113:14, 113:17, 113:20, 114:3, 114:22, 115:7, 128:14, 152:11, 153:13, 154:2, 165:2, 176:23, 181:9, 181:10, 181:16, 183:11, 184:7, 187:18, 187:19, 188:6, 189:13, 190:23, 191:1 REPORTER [1] - 212:5 reporter [3] - 140:4, 140:8, 165:11 Reporter [2] - 212:8 reports [28] - 10:1, 59:20, 62:7, 62:19, 67:24, 68:2, 68:21, 98:13, 101:2, 108:21, 108:22, 145:2, 147:21, 149:11, 149:15, 151:14, 156:6, 163:8, 164:13, 173:2, 174:10, 181:9, 181:21,</p>
---	--	--

Hawkins Reporting Service

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(302) 658-6697 EMAIL: Dalehrs@aol.com

<p>186:16, 186:17, 186:20, 197:12, 197:17</p> <p>representation [3] - 36:2, 36:8, 36:14</p> <p>request [13] - 34:3, 100:20, 130:23, 144:24, 178:2, 189:5, 190:14, 191:5, 191:6, 198:24, 199:15, 201:15, 201:16</p> <p>requested [3] - 8:8, 142:24, 196:22</p> <p>requests [1] - 202:6</p> <p>require [8] - 9:22, 19:5, 30:22, 39:8, 42:12, 45:22, 156:24, 193:21</p> <p>required [15] - 8:15, 11:17, 12:14, 12:16, 15:23, 16:2, 27:3, 27:4, 29:4, 35:3, 42:11, 54:15, 63:6, 67:20, 104:7</p> <p>requirement [17] - 10:5, 14:2, 15:18, 21:20, 24:15, 26:13, 29:20, 32:24, 39:4, 39:5, 39:13, 54:4, 63:22, 63:24, 66:19, 67:14, 117:24</p> <p>requirements [4] - 12:6, 32:18, 35:24, 39:23</p> <p>requires [7] - 15:5, 52:4, 52:5, 66:14, 66:15, 67:18, 125:22</p> <p>requiring [6] - 10:22, 14:22, 23:16, 23:23, 28:18, 63:21</p> <p>reschedule [1] - 166:5</p> <p>rescheduling [1] - 71:9</p> <p>reserve [2] - 70:24, 203:16</p> <p>reserved [3] - 91:6, 136:20, 195:14</p> <p>reserving [2] - 36:24, 48:16</p> <p>residual [2] - 102:7, 115:18</p> <p>resistant [6] - 107:13, 107:15, 107:18, 107:20, 108:7, 108:24</p> <p>resolution [1] - 6:10</p> <p>resolve [8] - 56:1, 144:23, 145:5, 160:8, 176:19, 183:19, 196:9, 210:12</p> <p>resolved [12] - 54:11, 54:21, 56:17, 59:6, 64:18, 65:11, 93:12, 139:22, 177:2, 194:6, 194:24</p> <p>resolving [2] - 38:13, 192:23</p> <p>resources [1] - 143:18</p> <p>respect [106] - 4:12, 7:17, 12:6, 26:1, 28:9, 30:17, 34:7, 34:14, 35:10, 36:3, 36:4, 36:17, 36:18, 37:16, 37:19, 38:12, 41:6, 45:9, 47:8, 47:23, 48:6, 48:14, 49:2, 49:23, 50:5, 51:22, 52:11, 53:12, 56:2, 57:6, 59:2, 60:10, 61:9, 65:5, 69:1, 69:12, 70:8, 71:4, 72:14, 72:17, 72:19, 73:21, 76:3, 88:6, 98:4, 98:6, 99:20, 100:18, 106:20, 108:7, 108:8, 108:24, 113:11, 131:20, 133:9, 134:7, 135:18, 135:21, 137:22, 145:19, 147:6, 147:12, 148:3, 148:20, 150:8, 151:7, 151:11, 151:15, 151:24, 152:6, 152:10, 152:21, 153:5, 153:22, 155:2, 155:4, 155:12, 168:23, 176:22, 177:5, 178:11, 179:10, 179:11, 180:3, 180:7, 180:8, 180:10, 180:17, 180:18, 180:21, 181:1, 181:8, 181:11, 181:17, 182:11, 183:7, 183:13, 183:20, 183:21, 184:15, 187:6, 189:2, 189:3, 190:7, 192:10, 192:22</p>	<p>respectfully [3] - 45:2, 147:19, 179:6</p> <p>respective [1] - 71:10</p> <p>respects [2] - 97:21, 105:17</p> <p>respond [16] - 37:3, 45:13, 68:9, 107:7, 107:8, 114:19, 138:19, 149:14, 153:17, 160:20, 160:23, 163:14, 163:15, 168:20, 183:7, 185:18</p> <p>response [14] - 45:20, 46:1, 46:2, 53:22, 79:5, 97:6, 106:14, 108:3, 154:13, 158:19, 159:2, 189:4, 189:18, 204:15</p> <p>responsive [3] - 18:4, 46:13, 46:21</p> <p>rest [4] - 46:19, 75:16, 192:5, 195:16</p> <p>result [3] - 68:18, 102:2, 174:15</p> <p>resulting [1] - 68:13</p> <p>results [2] - 83:6, 112:22</p> <p>retains [1] - 49:16</p> <p>reteaching [1] - 63:2</p> <p>retry [1] - 77:1</p> <p>return [1] - 90:21</p> <p>returns [1] - 76:19</p> <p>revenues [1] - 113:1</p> <p>reversal [2] - 77:11, 96:17</p> <p>reversed [2] - 87:13, 87:21</p> <p>reverses [1] - 136:17</p> <p>review [6] - 71:19, 83:5, 83:16, 183:11, 186:8, 206:10</p> <p>reviewed [3] - 107:16, 190:5</p> <p>reviewing [1] - 5:1</p> <p>revised [1] - 206:8</p> <p>revisit [1] - 206:7</p> <p>Rhee [7] - 74:4, 74:15, 88:15, 181:3, 181:4, 181:5</p> <p>rights [2] - 168:8, 195:15</p> <p>ripe [1] - 145:4</p> <p>risk [7] - 90:11, 90:18, 92:2, 135:22, 136:13, 136:14</p> <p>Rivot [1] - 185:10</p> <p>RMR [1] - 212:20</p> <p>Robert [1] - 3:9</p> <p>ROBERT [1] - 2:6</p> <p>room [1] - 204:18</p> <p>root [1] - 191:7</p> <p>ROTH [1] - 2:7</p> <p>Roth [1] - 3:10</p> <p>roughly [1] - 199:20</p> <p>round [2] - 68:2, 68:3</p> <p>route [2] - 86:3, 86:6</p> <p>royalties [15] - 91:13, 91:14, 91:15, 100:22, 102:3, 102:6, 102:8, 104:9, 111:13, 111:22, 114:23, 115:2, 115:5, 115:16, 115:19</p> <p>royalty [39] - 91:19, 98:10, 101:8, 101:19, 102:2, 102:14, 102:20, 103:5, 103:9, 103:12, 103:21, 103:23, 104:5, 104:15, 104:22, 105:10, 109:22, 109:23, 109:24, 110:2, 110:7, 110:12, 110:17, 110:22, 111:4, 112:6, 112:7, 112:21, 112:23, 112:24, 113:20, 114:6, 114:10, 114:17, 115:10,</p>	<p>115:13, 187:8, 187:22, 190:12</p> <p>Rule [6] - 158:18, 158:24, 159:1, 170:11, 170:12, 174:2</p> <p>rule [19] - 131:18, 139:3, 161:18, 169:18, 177:16, 177:23, 178:6, 178:7, 178:16, 184:6, 186:5, 186:6, 186:7, 186:12, 186:13, 189:8, 191:8, 196:22, 207:16</p> <p>ruled [6] - 110:8, 134:9, 177:13, 182:8, 195:11</p> <p>ruling [16] - 49:19, 49:24, 96:12, 100:13, 130:10, 131:14, 133:10, 137:12, 138:11, 157:1, 158:1, 178:19, 182:10, 186:7, 186:24, 197:9</p> <p>rulings [7] - 4:16, 8:10, 131:16, 147:5, 192:18, 206:5, 206:6</p> <p>run [3] - 5:3, 6:24, 67:12</p> <p>running [3] - 196:10, 196:14, 196:18</p> <p>runs [1] - 150:6</p> <p>rushed [1] - 167:3</p>
S		
<p>safe [1] - 85:7</p> <p>sake [1] - 100:15</p> <p>sale [1] - 163:22</p> <p>SALES [1] - 1:5</p> <p>sales [32] - 101:6, 101:18, 101:23, 101:24, 102:1, 102:4, 102:8, 102:10, 103:11, 104:17, 104:18, 104:19, 104:21, 105:9, 105:12, 110:20, 111:3, 111:9, 112:8, 112:11, 112:12, 112:13, 112:15, 112:22, 114:4, 114:5, 114:14, 114:16, 115:7, 115:12, 115:19, 187:8</p> <p>satisfied [1] - 38:19</p> <p>Saturday [2] - 185:5, 185:21</p> <p>save [4] - 87:19, 94:3, 94:4, 155:21</p> <p>saw [6] - 4:24, 31:5, 31:6, 46:10, 122:6, 123:10</p> <p>Sawhney [1] - 209:16</p> <p>scales [1] - 71:22</p> <p>schedule [3] - 78:2, 204:5, 209:21</p> <p>scheduled [5] - 89:16, 139:22, 166:7, 166:10, 166:12</p> <p>scheduling [1] - 160:18</p> <p>scientific [1] - 56:4</p> <p>scientifically [1] - 119:13</p> <p>scope [30] - 14:13, 14:18, 14:23, 15:17, 16:9, 27:2, 27:7, 29:19, 34:24, 35:1, 35:9, 42:1, 42:3, 42:7, 42:12, 42:17, 42:24, 43:3, 43:5, 44:17, 49:15, 50:9, 50:14, 148:11, 149:23, 178:21, 186:3, 197:3, 210:3</p> <p>scopes [1] - 40:8</p> <p>score [1] - 156:2</p> <p>scratching [1] - 175:20</p> <p>seal [2] - 17:24, 212:15</p> <p>sealed [1] - 200:4</p> <p>searched [1] - 174:9</p>		

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<p>seat [2] - 47:9, 205:10</p> <p>seated [2] - 3:2, 204:10</p> <p>second [24] - 17:17, 27:10, 28:1, 28:10, 28:13, 28:17, 29:12, 35:9, 45:6, 54:4, 60:7, 69:20, 70:17, 78:18, 82:13, 84:10, 90:6, 92:2, 94:4, 94:9, 117:11, 125:13, 128:17, 136:10</p> <p>secondary [2] - 68:2</p> <p>secondly [1] - 159:4</p> <p>seconds [17] - 52:8, 53:3, 54:3, 57:13, 72:10, 74:1, 116:9, 117:12, 122:2, 122:17, 123:22, 124:21, 125:4, 128:20, 128:22, 129:2, 183:22</p> <p>section [3] - 7:18, 86:1</p> <p>Section [4] - 83:7, 83:10, 83:12, 84:12</p> <p>sections [1] - 153:13</p> <p>security [1] - 199:23</p> <p>see [58] - 5:4, 13:8, 15:2, 17:11, 17:13, 17:22, 18:10, 18:12, 20:23, 21:23, 25:8, 29:17, 31:4, 31:9, 33:20, 36:15, 40:7, 40:14, 44:15, 44:24, 45:24, 49:4, 57:3, 57:18, 58:9, 58:15, 59:24, 76:11, 84:11, 99:19, 107:8, 111:19, 112:20, 115:15, 117:3, 118:1, 118:2, 119:3, 121:3, 121:8, 123:3, 123:9, 123:18, 126:12, 127:9, 128:15, 147:17, 151:23, 161:5, 164:20, 179:7, 186:10, 188:14, 191:24, 205:4, 210:23</p> <p>seeing [1] - 38:6</p> <p>seek [2] - 49:6, 191:8</p> <p>seeking [7] - 49:14, 51:17, 98:6, 100:5, 100:9, 188:21, 188:24</p> <p>seem [5] - 48:20, 68:5, 92:12, 106:7, 136:3</p> <p>segmented [1] - 18:23</p> <p>segregate [1] - 200:2</p> <p>selected [1] - 161:23</p> <p>selection [3] - 202:15, 204:1, 204:3</p> <p>self [2] - 95:4, 125:12</p> <p>send [1] - 202:5</p> <p>sense [4] - 52:12, 64:24, 181:23, 198:15</p> <p>sent [1] - 87:13</p> <p>separate [7] - 23:5, 38:1, 51:24, 57:10, 75:15, 78:3, 95:19</p> <p>separately [1] - 95:10</p> <p>serious [2] - 140:21</p> <p>seriously [1] - 164:3</p> <p>serve [1] - 211:11</p> <p>set [22] - 4:7, 33:12, 55:5, 56:9, 65:12, 78:22, 80:6, 112:9, 113:13, 118:15, 118:16, 118:17, 119:21, 120:6, 138:6, 144:5, 149:8, 165:8, 165:12, 166:15, 196:6, 212:14</p> <p>sets [1] - 72:16</p> <p>setting [2] - 43:8, 123:12</p> <p>settling [1] - 80:23</p> <p>seven [5] - 13:12, 15:1, 78:18, 205:20, 205:21</p> <p>seventeen [1] - 202:1</p> <p>seventies [1] - 165:17</p>	<p>sever [10] - 4:11, 71:3, 73:1, 76:18, 96:19, 131:19, 132:21, 134:13, 158:1, 182:14</p> <p>several [4] - 18:17, 64:1, 163:6, 171:8</p> <p>severed [5] - 77:18, 145:22, 176:16, 180:8, 180:22</p> <p>severing [2] - 71:22, 142:18</p> <p>shade [4] - 21:3, 21:21, 22:7, 39:17</p> <p>shades [2] - 21:6, 21:12</p> <p>share [8] - 101:6, 101:11, 104:16, 179:15, 179:16, 179:17, 179:18, 179:20</p> <p>Shaw [3] - 140:5, 141:2, 165:17</p> <p>sheet [6] - 76:21, 92:15, 93:15, 93:16, 95:11, 136:8</p> <p>shell [1] - 102:11</p> <p>shift [1] - 203:16</p> <p>shoehorn [1] - 191:6</p> <p>shooting [1] - 154:12</p> <p>short [6] - 6:1, 17:7, 96:15, 121:2, 130:24, 131:5</p> <p>Shorthand [1] - 212:8</p> <p>shot [1] - 50:20</p> <p>show [17] - 23:17, 25:17, 33:14, 59:4, 80:12, 115:18, 116:13, 120:9, 121:14, 125:3, 149:16, 152:17, 164:16, 191:11, 193:22, 195:5, 196:14</p> <p>showing [1] - 196:12</p> <p>shown [3] - 115:9, 115:10, 193:14</p> <p>shows [4] - 17:15, 105:24, 117:13, 125:10</p> <p>sick [1] - 143:22</p> <p>side [24] - 6:12, 59:4, 95:18, 156:6, 165:20, 170:7, 170:18, 180:12, 192:11, 192:13, 195:9, 196:14, 196:17, 197:19, 200:18, 200:20, 200:21, 203:8, 203:12, 203:18, 204:18, 204:24, 205:4, 205:11</p> <p>side's [1] - 194:20</p> <p>side-bar [1] - 204:18</p> <p>sides [1] - 96:7</p> <p>sides' [1] - 197:7</p> <p>significant [1] - 90:7</p> <p>significantly [3] - 72:6, 135:24, 150:24</p> <p>silent [1] - 205:14</p> <p>similar [1] - 82:8</p> <p>similarly [1] - 133:1</p> <p>simple [3] - 61:22, 97:15, 158:15</p> <p>simplest [1] - 158:12</p> <p>simplification [3] - 71:24, 132:20, 135:21</p> <p>simplified [1] - 88:22</p> <p>simplify [8] - 72:24, 73:13, 80:4, 80:9, 80:12, 80:14, 132:22, 133:24</p> <p>simplifying [1] - 133:19</p> <p>simply [3] - 47:18, 62:14, 177:10</p> <p>simultaneously [1] - 53:14</p> <p>single [14] - 11:24, 22:17, 22:21, 23:13, 29:15, 34:5, 41:2, 44:13, 46:16, 185:6, 188:11, 208:17</p>	<p>singular [2] - 25:14, 29:14</p> <p>sit [1] - 118:12</p> <p>site [2] - 123:11, 125:7</p> <p>sitting [1] - 140:4</p> <p>situation [7] - 71:15, 85:23, 96:15, 131:24, 132:8, 156:1, 178:22</p> <p>six [9] - 77:23, 143:23, 165:19, 165:23, 166:5, 166:16, 166:21, 201:5, 205:17</p> <p>sixteen [1] - 202:1</p> <p>skill [9] - 14:4, 35:15, 57:16, 57:17, 61:6, 61:13, 68:22, 69:6, 70:2</p> <p>slapped [1] - 140:12</p> <p>slide [14] - 17:1, 20:2, 20:3, 20:5, 21:16, 21:17, 23:7, 24:4, 84:24, 119:19, 120:22, 123:2, 161:4</p> <p>slides [5] - 19:21, 55:16, 82:23, 160:24, 191:11</p> <p>slightly [1] - 157:20</p> <p>slowly [1] - 9:11</p> <p>small [2] - 6:23, 16:12</p> <p>soft [1] - 118:15</p> <p>solely [1] - 138:7</p> <p>solid [20] - 53:5, 56:8, 57:18, 118:1, 118:3, 118:16, 119:17, 120:5, 121:8, 121:12, 124:23, 125:4, 125:15, 125:24, 126:16, 126:21, 127:9, 127:15, 129:10, 129:13</p> <p>solidification [1] - 129:8</p> <p>someone [6] - 109:10, 161:10, 174:13, 202:12, 202:23, 209:24</p> <p>sometime [1] - 210:22</p> <p>somewhat [1] - 150:17</p> <p>somewhere [2] - 22:4, 42:6</p> <p>soon [2] - 134:18, 210:11</p> <p>sorry [7] - 11:20, 24:9, 51:5, 90:16, 173:5, 180:9, 187:16</p> <p>sort [9] - 32:9, 76:13, 77:2, 95:17, 155:7, 167:3, 172:5, 180:2, 181:21</p> <p>sorted [1] - 78:5</p> <p>sought [1] - 8:9</p> <p>sound [1] - 190:17</p> <p>sounded [1] - 168:19</p> <p>sounds [2] - 175:10, 197:13</p> <p>source [1] - 163:2</p> <p>space [3] - 185:6, 185:20, 185:22</p> <p>speaking [1] - 194:17</p> <p>special [2] - 75:23, 76:13</p> <p>species [8] - 43:8, 43:10, 43:15, 43:16, 43:17, 52:6, 52:20</p> <p>specific [45] - 6:8, 8:16, 10:14, 10:15, 10:16, 11:6, 11:7, 11:9, 12:8, 12:11, 21:11, 23:23, 23:24, 24:15, 25:7, 26:22, 28:14, 28:19, 28:20, 36:11, 36:12, 37:11, 37:12, 39:14, 39:17, 41:8, 49:14, 69:3, 98:21, 149:8, 154:16, 156:21, 161:15, 163:2, 207:18, 208:21</p> <p>specifically [10] - 34:23, 52:23, 74:4, 92:20, 102:7, 148:11, 150:10, 171:20, 188:11, 208:17</p>
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<p>specification [7] - 13:16, 14:3, 29:8, 30:12, 65:1, 82:3, 82:4</p> <p>specifications [1] - 82:20</p> <p>specificity [1] - 155:20</p> <p>specifics [1] - 47:23</p> <p>specify [1] - 126:6</p> <p>speculation [5] - 87:9, 87:20, 90:24, 92:6, 92:8</p> <p>speculative [2] - 136:3, 209:21</p> <p>spelled [1] - 53:24</p> <p>spinning [3] - 120:23, 121:4, 122:7</p> <p>split [2] - 194:23, 203:9</p> <p>spray [3] - 17:23, 78:20, 123:15</p> <p>sprayed [1] - 125:7</p> <p>sprayer [1] - 17:12</p> <p>spraying [2] - 123:9, 123:11</p> <p>sprays [1] - 17:14</p> <p>squirt [4] - 120:15, 120:24, 121:5, 121:6</p> <p>staff [1] - 204:19</p> <p>stage [3] - 69:20, 89:12, 119:16</p> <p>stand [5] - 36:17, 49:13, 194:9, 194:14, 204:14</p> <p>standard [3] - 28:19, 64:24, 128:20</p> <p>standards [3] - 87:23, 88:3, 88:4</p> <p>standing [2] - 68:14, 68:20</p> <p>standpoint [2] - 29:20, 29:21</p> <p>STARGATT [1] - 2:3</p> <p>STARK [1] - 1:18</p> <p>start [13] - 3:2, 5:14, 5:16, 40:6, 40:8, 54:5, 54:16, 116:20, 125:5, 144:23, 165:15, 198:14, 206:7</p> <p>starting [2] - 39:7, 54:11</p> <p>starts [3] - 54:17, 120:16, 196:20</p> <p>state [3] - 71:3, 90:20, 125:11</p> <p>State [1] - 212:1</p> <p>statements [3] - 162:11, 198:10, 198:12</p> <p>STATES [1] - 1:2</p> <p>States [13] - 1:19, 98:1, 100:2, 100:23, 101:24, 102:6, 103:10, 104:6, 110:1, 111:10, 111:13, 187:8, 190:13</p> <p>statistics [1] - 92:9</p> <p>status [5] - 75:22, 79:7, 80:5, 80:10, 134:1</p> <p>statute [4] - 75:5, 86:8, 104:7, 114:7</p> <p>stay [17] - 4:12, 51:13, 73:1, 76:19, 77:14, 80:4, 82:11, 85:23, 89:10, 89:14, 89:17, 90:9, 90:13, 96:20, 131:19, 134:12, 141:8</p> <p>stayed [6] - 77:19, 80:3, 137:24, 176:16, 180:8, 180:22</p> <p>staying [4] - 71:22, 80:8, 90:2, 142:18</p> <p>stays [1] - 186:2</p> <p>steering [1] - 35:5</p> <p>stenographic [1] - 212:10</p> <p>step [1] - 73:23</p> <p>STEPHEN [1] - 2:15</p> <p>Stephen [1] - 3:18</p> <p>Steve [1] - 97:20</p> <p>stick [1] - 123:13</p>	<p>still [40] - 17:21, 19:24, 54:20, 55:20, 56:16, 57:24, 61:5, 73:19, 80:22, 93:9, 99:10, 99:15, 105:22, 110:10, 110:16, 111:12, 113:5, 113:15, 114:15, 117:1, 131:10, 133:5, 134:8, 137:15, 144:17, 145:4, 147:6, 156:16, 172:12, 174:11, 175:20, 176:5, 178:7, 180:12, 188:9, 189:7, 189:18, 189:24, 190:16, 201:2</p> <p>stop [6] - 22:3, 22:4, 29:17, 54:6, 54:13, 59:23</p> <p>stopped [1] - 122:7</p> <p>stops [3] - 121:1, 121:6, 121:7</p> <p>store [1] - 156:21</p> <p>straight [1] - 65:13</p> <p>straighten [1] - 183:2</p> <p>straightforward [2] - 59:8, 66:6</p> <p>strategy [4] - 164:6, 170:5, 170:6, 174:22</p> <p>Street [1] - 1:15</p> <p>stretch [1] - 117:13</p> <p>stricken [14] - 33:10, 37:15, 40:1, 47:16, 62:7, 62:12, 62:13, 70:8, 105:16, 113:16, 113:21, 113:22, 181:22, 187:19</p> <p>stricter [1] - 113:22</p> <p>strictly [2] - 27:3, 156:19</p> <p>strike [9] - 33:21, 33:22, 36:3, 37:14, 46:12, 110:6, 173:24, 188:19, 205:5</p> <p>strikes [3] - 74:15, 205:12, 205:13</p> <p>striking [2] - 191:18, 205:16</p> <p>strongly [1] - 89:13</p> <p>struck [4] - 101:13, 102:23, 173:12, 205:18</p> <p>structural [3] - 62:2, 62:13, 69:9</p> <p>struggling [1] - 172:12</p> <p>stuff [5] - 54:22, 62:8, 63:13, 82:15, 87:12</p> <p>subject [7] - 102:1, 103:11, 104:21, 108:2, 157:14, 192:18, 192:20</p> <p>submission [5] - 5:15, 15:1, 32:12, 70:13, 149:7</p> <p>submissions [5] - 58:15, 76:11, 150:13, 186:10, 211:6</p> <p>submit [2] - 110:9, 206:4</p> <p>submitted [5] - 44:14, 101:2, 189:12, 189:15, 206:15</p> <p>subpoenas [1] - 209:13</p> <p>subsequent [1] - 105:9</p> <p>subsequently [1] - 114:15</p> <p>subset [3] - 22:7, 149:16, 152:17</p> <p>substance [1] - 63:9</p> <p>substantial [4] - 97:10, 138:22, 140:2, 140:20</p> <p>substrate [2] - 53:4, 179:22</p> <p>successful [3] - 74:11, 84:4, 88:19</p> <p>successfully [1] - 74:23</p> <p>sufficient [4] - 128:5, 128:9, 129:7, 149:1</p> <p>suggest [2] - 184:6, 195:17</p>	<p>suggestion [1] - 144:1</p> <p>suit [2] - 91:12, 171:24</p> <p>suitable [13] - 60:13, 62:1, 62:9, 62:10, 63:19, 67:1, 67:8, 68:13, 68:17, 68:19, 68:23, 69:7, 185:12</p> <p>sulfate [7] - 60:6, 62:8, 63:3, 66:17, 68:12, 68:16, 70:9</p> <p>sulphate [4] - 63:8, 66:3, 66:4, 69:12</p> <p>summary [17] - 4:20, 38:13, 45:20, 55:7, 57:6, 57:21, 58:6, 68:3, 80:17, 115:23, 124:14, 127:2, 130:11, 132:5, 134:7, 179:9, 189:9</p> <p>supercede [1] - 114:1</p> <p>superceded [1] - 110:1</p> <p>superseded [1] - 105:7</p> <p>superseding [1] - 104:12</p> <p>supplement [1] - 170:12</p> <p>supplemental [5] - 105:20, 110:10, 113:24, 114:24, 145:1</p> <p>supplemented [1] - 158:24</p> <p>support [4] - 75:6, 77:19, 95:17, 116:8</p> <p>supported [1] - 91:11</p> <p>supports [1] - 141:14</p> <p>supposed [2] - 139:24, 165:15</p> <p>surgical [1] - 125:7</p> <p>SURGICAL [1] - 1:5</p> <p>surprise [6] - 108:21, 170:15, 171:3, 171:20, 174:17</p> <p>surprised [4] - 170:2, 187:14, 187:21, 196:20</p> <p>suspect [1] - 70:23</p> <p>sustain [1] - 121:23</p> <p>swath [1] - 181:17</p> <p>sweep [1] - 6:12</p>
T		
<p>tab [2] - 114:24, 115:15</p> <p>table [1] - 180:17</p> <p>tailor [1] - 91:9</p> <p>tailored [1] - 92:20</p> <p>taint [3] - 76:1, 76:3, 77:9</p> <p>talks [3] - 9:11, 60:19, 62:24</p> <p>Tan [6] - 159:9, 160:6, 162:17, 169:7, 171:20, 209:15</p> <p>target [1] - 154:13</p> <p>Tariff [1] - 83:13</p> <p>taught [3] - 82:3, 82:10, 87:12</p> <p>TAYLOR [1] - 2:3</p> <p>teach [4] - 14:4, 43:14, 43:16, 72:22</p> <p>teaches [1] - 35:14</p> <p>teaching [3] - 13:16, 15:19, 72:20</p> <p>Tech [1] - 89:23</p> <p>technical [2] - 56:4, 56:6</p> <p>TECHNOLOGY [1] - 1:9</p> <p>telephonically [1] - 140:6</p> <p>ten [2] - 161:23, 172:8</p> <p>tension [1] - 70:1</p> <p>tensions [1] - 60:10</p>		

Hawkins Reporting Service

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(302) 658-6697 EMAIL: Dalehrs@aol.com

<p>term ^[14] - 60:20, 61:9, 61:14, 61:16, 61:22, 63:19, 64:15, 65:10, 66:1, 67:17, 69:24, 184:9, 185:13, 185:14</p> <p>terms ^[19] - 61:7, 65:4, 65:12, 70:4, 71:24, 78:7, 86:21, 100:22, 120:10, 124:17, 133:14, 134:16, 192:16, 193:11, 196:3, 196:21, 199:18, 206:2, 209:24</p> <p>test ^[7] - 29:9, 29:16, 30:13, 30:14, 164:14, 173:6, 173:8</p> <p>testified ^[4] - 53:6, 126:12, 159:20, 175:12</p> <p>testify ^[21] - 51:7, 156:18, 157:3, 159:6, 159:7, 160:13, 160:15, 161:21, 163:19, 163:21, 169:2, 169:6, 169:7, 169:16, 171:18, 174:16, 175:13, 176:6, 187:9, 208:4, 210:15</p> <p>testifying ^[5] - 158:22, 171:21, 190:3, 197:2, 201:8</p> <p>testimony ^[32] - 39:20, 49:5, 50:14, 61:13, 103:22, 106:3, 108:1, 109:9, 109:14, 109:21, 127:7, 127:8, 139:1, 139:12, 140:15, 141:10, 143:2, 143:5, 143:21, 160:2, 172:23, 175:8, 175:15, 177:8, 180:18, 181:22, 190:2, 191:19, 196:22, 197:18, 199:2, 208:12</p> <p>testing ^[1] - 165:9</p> <p>THE ^[301] - 1:2, 1:2, 1:18, 3:1, 3:6, 3:11, 3:19, 5:10, 5:13, 6:4, 7:6, 7:21, 8:1, 8:18, 9:9, 9:14, 9:18, 10:2, 10:8, 10:20, 11:15, 12:2, 12:20, 14:6, 15:10, 15:22, 16:3, 16:13, 16:17, 17:5, 19:16, 19:22, 21:2, 21:8, 21:13, 22:12, 22:23, 23:4, 23:14, 23:22, 24:5, 24:11, 24:21, 25:10, 25:18, 25:23, 26:5, 26:8, 26:15, 26:21, 27:4, 27:9, 27:19, 27:24, 29:2, 29:22, 30:4, 31:3, 32:3, 34:9, 35:17, 35:21, 36:18, 36:22, 37:3, 37:24, 40:2, 40:24, 41:11, 41:21, 42:5, 42:14, 42:22, 43:18, 44:2, 44:7, 47:3, 47:11, 51:4, 51:9, 51:13, 53:21, 55:4, 55:10, 55:17, 56:11, 56:23, 57:3, 58:5, 58:17, 59:12, 59:16, 59:23, 60:3, 60:8, 63:14, 64:3, 66:2, 66:24, 68:8, 70:14, 70:17, 71:2, 71:12, 72:24, 74:17, 76:17, 78:13, 78:24, 79:7, 79:12, 79:17, 79:23, 80:19, 81:8, 83:1, 83:22, 84:16, 84:20, 85:13, 86:10, 86:15, 86:20, 88:23, 89:5, 89:9, 90:11, 90:18, 92:1, 92:7, 92:22, 93:2, 93:6, 93:14, 93:23, 94:7, 94:22, 97:12, 98:5, 98:16, 99:18, 100:8, 100:18, 104:8, 104:24, 106:1, 106:13, 106:20, 107:3, 107:23, 108:10, 109:4, 109:15, 110:15, 111:5, 111:11, 111:18, 113:4, 113:8, 113:23, 114:18, 115:21, 116:11, 121:23, 122:14, 122:22, 124:7, 124:10, 125:16, 126:8, 127:3, 127:10, 127:18, 127:21, 128:10, 129:6, 130:8, 130:14, 130:21, 131:1, 131:5, 131:8, 138:18,</p>	<p>139:14, 139:21, 140:24, 141:15, 142:5, 142:8, 142:13, 142:22, 143:24, 144:6, 144:14, 145:9, 145:13, 145:16, 146:5, 146:10, 146:15, 146:22, 147:1, 147:8, 147:17, 147:23, 148:16, 149:12, 150:8, 151:2, 151:15, 151:19, 151:22, 153:4, 153:16, 154:20, 155:14, 156:23, 157:8, 157:11, 157:17, 157:24, 158:6, 159:10, 159:19, 159:23, 160:22, 161:2, 161:5, 161:9, 161:14, 161:24, 162:10, 162:20, 163:11, 163:17, 163:23, 164:18, 164:22, 165:3, 165:24, 166:4, 166:11, 166:19, 167:2, 167:9, 167:17, 168:1, 168:18, 169:22, 170:1, 171:12, 172:12, 173:3, 173:20, 176:10, 176:12, 177:7, 177:13, 177:21, 178:6, 178:11, 178:24, 179:4, 181:24, 182:7, 182:21, 183:6, 184:5, 184:14, 190:10, 190:17, 191:9, 191:22, 193:7, 193:10, 196:1, 196:3, 198:21, 198:23, 199:12, 199:18, 200:14, 200:16, 201:10, 201:19, 202:11, 203:24, 206:2, 206:22, 207:2, 207:17, 207:24, 208:14, 209:5, 209:8, 210:5, 210:18, 210:23, 211:4, 211:17, 211:20</p> <p>theories ^[6] - 85:10, 85:11, 102:18, 147:3, 148:9, 153:21</p> <p>theory ^[8] - 36:11, 91:11, 101:7, 101:12, 104:1, 129:14, 145:18, 156:19</p> <p>thereabouts ^[1] - 166:6</p> <p>thereafter ^[1] - 86:11</p> <p>therefor ^[1] - 153:10</p> <p>therefore ^[4] - 25:12, 36:2, 110:3, 127:2</p> <p>they've ^[1] - 6:15</p> <p>thicker ^[3] - 21:22, 31:9, 63:3</p> <p>thickness ^[89] - 6:17, 7:14, 7:23, 8:2, 8:11, 8:13, 8:17, 9:2, 9:7, 9:12, 9:17, 10:14, 10:16, 10:19, 11:7, 11:9, 11:24, 12:13, 13:13, 13:19, 13:23, 15:4, 17:20, 18:6, 19:8, 19:10, 19:15, 20:2, 20:4, 20:6, 20:16, 20:17, 20:22, 21:7, 22:5, 22:17, 22:19, 23:9, 23:24, 24:16, 25:4, 25:22, 26:23, 28:15, 28:19, 28:21, 28:22, 29:13, 29:16, 30:21, 30:24, 31:8, 31:17, 33:20, 34:1, 34:6, 34:20, 36:12, 36:13, 38:10, 38:15, 39:2, 39:23, 40:16, 41:8, 41:10, 44:13, 44:19, 44:23, 45:16, 46:4, 46:16, 72:5, 72:7, 73:5, 73:7, 80:24, 81:1, 81:3, 81:12, 81:20, 81:24, 148:22, 177:12, 177:14, 179:13, 179:14, 180:13</p> <p>thicknesses ^[9] - 18:16, 18:21, 19:1, 21:9, 28:23, 29:14, 41:9, 46:11, 46:21</p> <p>thin ^[2] - 17:19, 22:6</p> <p>thinking ^[2] - 181:24, 182:3</p> <p>thinks ^[2] - 140:22, 156:7</p> <p>third ^[6] - 18:7, 26:5, 30:4, 36:22, 98:17, 98:18</p> <p>thirty ^[3] - 201:4, 201:5</p>	<p>thirty-five ^[1] - 201:5</p> <p>thirty-six ^[1] - 201:5</p> <p>THOMAS ^[1] - 2:11</p> <p>Thomas ^[4] - 3:13, 89:23, 158:7, 158:17</p> <p>threat ^[1] - 91:11</p> <p>three ^[33] - 8:15, 8:18, 8:20, 9:7, 9:8, 10:5, 10:6, 10:9, 10:17, 10:22, 10:23, 11:5, 11:17, 26:9, 32:9, 32:15, 32:18, 32:20, 34:17, 40:22, 41:14, 48:14, 48:18, 49:2, 80:2, 80:7, 97:22, 101:5, 116:23, 165:15, 185:21, 205:11, 208:10</p> <p>three-dimensional ^[1] - 116:23</p> <p>throw ^[3] - 33:3, 33:6, 34:4</p> <p>thrown ^[2] - 74:14, 136:22</p> <p>throws ^[1] - 94:13</p> <p>Thursday ^[4] - 185:5, 185:6, 202:4, 206:9</p> <p>tibular ^[1] - 70:9</p> <p>ticking ^[1] - 96:4</p> <p>tied ^[2] - 34:21, 57:5</p> <p>TIGAN ^[2] - 2:12, 146:12</p> <p>Tigan ^[1] - 3:15</p> <p>timed ^[1] - 200:17</p> <p>timely ^[1] - 158:23</p> <p>timing ^[3] - 77:22, 78:8, 194:2</p> <p>tint ^[2] - 38:20, 38:23</p> <p>tiny ^[1] - 211:4</p> <p>tipped ^[1] - 71:21</p> <p>tissue ^[23] - 52:2, 52:7, 52:9, 52:14, 52:22, 53:15, 54:17, 57:14, 60:13, 61:22, 62:1, 62:10, 63:19, 64:22, 67:1, 67:8, 68:14, 68:17, 68:19, 68:23, 69:7, 179:18, 185:13</p> <p>Title ^[1] - 83:11</p> <p>today ^[9] - 34:8, 49:22, 50:3, 113:9, 157:1, 165:9, 192:5, 201:22</p> <p>together ^[8] - 7:11, 11:6, 34:17, 34:21, 120:16, 140:12, 168:16, 209:22</p> <p>tomorrow ^[17] - 89:16, 138:7, 138:10, 138:20, 139:15, 139:18, 139:22, 140:22, 143:9, 143:16, 143:17, 144:5, 144:11, 157:15, 157:22, 165:15, 166:8</p> <p>took ^[4] - 6:6, 8:5, 69:21, 81:17</p> <p>top ^[1] - 98:11</p> <p>topics ^[5] - 159:6, 160:14, 163:20, 171:5, 175:11</p> <p>total ^[1] - 113:1</p> <p>touch ^[4] - 14:9, 101:20, 166:14, 186:1</p> <p>towards ^[3] - 65:20, 160:18, 170:20</p> <p>toxic ^[2] - 63:9, 68:16</p> <p>toxicity ^[1] - 62:4</p> <p>track ^[1] - 203:21</p> <p>Trade ^[1] - 83:12</p> <p>trail ^[2] - 156:4, 162:13</p> <p>trailing ^[1] - 78:22</p> <p>transcribed ^[1] - 140:17</p> <p>transcript ^[4] - 196:11, 196:15, 196:18, 212:10</p>
---	--	--

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(302) 658-6697 EMAIL: Dalehrs@aol.com

<p>transition ^[1] - 198:10</p> <p>transparency ^[6] - 12:12, 14:1, 19:6, 31:14, 39:14, 39:15</p> <p>treat ^[1] - 205:19</p> <p>trial ^[105] - 3:22, 5:4, 25:24, 46:24, 47:5, 47:7, 47:21, 48:20, 50:20, 55:22, 58:10, 68:6, 70:24, 71:17, 73:10, 77:24, 78:3, 78:23, 79:1, 80:4, 80:6, 80:9, 80:15, 81:9, 82:13, 85:20, 88:17, 89:16, 90:8, 90:10, 90:12, 90:19, 92:2, 92:12, 93:13, 94:9, 96:24, 98:24, 99:3, 99:10, 99:16, 100:16, 108:2, 111:6, 132:1, 132:22, 133:23, 134:21, 135:23, 136:10, 136:20, 143:8, 143:17, 143:19, 147:4, 149:16, 149:21, 150:3, 151:1, 152:1, 152:13, 152:21, 153:15, 155:23, 156:6, 157:18, 158:3, 159:14, 159:18, 160:2, 161:22, 164:16, 169:21, 170:5, 171:8, 173:9, 174:15, 175:2, 175:13, 176:2, 178:9, 179:10, 180:2, 180:20, 181:6, 182:18, 183:13, 186:4, 188:2, 188:14, 192:21, 193:1, 193:4, 193:20, 196:23, 197:10, 200:17, 202:22, 206:7, 206:9, 208:18, 209:13, 211:6, 211:8</p> <p>trials ^[1] - 137:7</p> <p>tried ^[4] - 110:5, 113:21, 192:17</p> <p>trouble ^[2] - 19:24, 94:4</p> <p>true ^[7] - 31:7, 95:5, 102:14, 107:23, 119:13, 174:11, 212:10</p> <p>truly ^[1] - 187:14</p> <p>try ^[19] - 24:5, 67:15, 73:15, 75:24, 76:14, 87:9, 87:14, 99:12, 133:13, 134:4, 136:16, 137:3, 143:3, 144:21, 170:20, 194:13, 200:1, 204:23, 209:22</p> <p>trying ^[19] - 4:8, 32:5, 41:3, 42:16, 42:23, 47:4, 48:2, 50:16, 63:1, 67:3, 99:11, 102:12, 103:1, 105:15, 162:21, 168:23, 184:18, 186:2, 191:5</p> <p>Tuesday ^[1] - 1:13</p> <p>TUNNELL ^[1] - 2:11</p> <p>Tunnell ^[1] - 3:14</p> <p>turn ^[1] - 144:21</p> <p>turning ^[2] - 48:8, 74:15</p> <p>turns ^[4] - 18:18, 61:5, 67:11, 205:17</p> <p>twisted ^[1] - 75:6</p> <p>two ^[65] - 10:13, 11:5, 14:12, 18:4, 18:5, 18:7, 19:14, 20:4, 20:13, 21:24, 22:8, 22:20, 23:9, 25:9, 25:16, 29:18, 31:20, 31:21, 35:23, 36:5, 48:9, 52:1, 53:13, 58:20, 58:24, 59:1, 62:19, 64:24, 65:18, 65:19, 68:6, 69:10, 71:16, 72:17, 72:19, 80:5, 84:2, 88:19, 93:3, 94:15, 97:21, 109:3, 112:12, 116:13, 118:17, 131:11, 139:14, 139:22, 143:17, 144:8, 144:15, 150:23, 158:2, 159:8, 159:13, 159:19, 164:20, 168:4, 171:7, 172:23, 175:2, 176:1, 176:4, 197:21, 201:17</p> <p>two-player ^[1] - 112:12</p>	<p>type ^[1] - 196:23</p> <p>types ^[2] - 84:1, 148:18</p> <p style="text-align: center;">U</p> <p>U.S ^[23] - 98:10, 101:9, 101:10, 102:4, 102:10, 102:21, 104:2, 104:9, 104:21, 105:9, 105:10, 105:12, 111:23, 112:12, 112:13, 113:1, 114:23, 115:2, 115:14, 115:16, 115:19, 126:15</p> <p>ultimate ^[1] - 96:8</p> <p>ultimately ^[2] - 85:14, 187:12</p> <p>unanimously ^[1] - 158:13</p> <p>uncertain ^[1] - 156:17</p> <p>unclear ^[2] - 145:17, 150:17</p> <p>uncontested ^[1] - 192:10</p> <p>under ^[11] - 82:20, 82:21, 83:6, 83:7, 83:10, 83:12, 151:11, 169:18, 175:8, 182:12, 192:19</p> <p>underlying ^[1] - 106:11</p> <p>understood ^[5] - 21:1, 28:3, 113:24, 182:10, 191:4</p> <p>undisputed ^[1] - 174:1</p> <p>unfairly ^[2] - 156:1, 187:23</p> <p>unicorn ^[1] - 71:16</p> <p>unique ^[11] - 71:15, 73:9, 73:22, 131:23, 132:8, 160:16, 168:3, 169:1, 178:1, 178:4, 178:22</p> <p>UNITED ^[1] - 1:2</p> <p>United ^[14] - 1:19, 98:1, 100:2, 100:23, 101:24, 102:6, 103:10, 104:5, 109:24, 111:10, 111:13, 165:14, 187:8, 190:13</p> <p>universally ^[1] - 129:19</p> <p>unless ^[3] - 141:11, 167:8, 192:8</p> <p>unlikely ^[1] - 78:8</p> <p>unnecessary ^[2] - 42:11, 152:20</p> <p>unreasonable ^[1] - 175:15</p> <p>unreliable ^[1] - 39:21</p> <p>unusual ^[1] - 131:24</p> <p>up ^[53] - 7:7, 16:24, 19:20, 20:15, 22:4, 22:24, 24:9, 29:18, 35:18, 36:16, 43:8, 50:10, 51:4, 55:16, 57:5, 58:19, 67:24, 78:17, 82:12, 93:12, 96:12, 116:5, 116:21, 117:6, 117:11, 118:8, 121:9, 123:16, 124:4, 128:1, 128:21, 134:11, 149:16, 152:17, 157:20, 162:10, 162:17, 164:4, 164:16, 165:8, 165:12, 165:16, 166:16, 169:11, 180:24, 182:17, 185:21, 195:13, 200:20, 203:9, 204:14, 205:1, 208:11</p> <p>update ^[1] - 172:15</p> <p>updated ^[1] - 202:6</p> <p>upheld ^[1] - 76:23</p> <p>urging ^[1] - 178:19</p> <p>user ^[15] - 10:15, 10:17, 23:24, 24:16, 24:22, 25:18, 25:20, 25:24, 26:23, 28:18, 29:8, 30:13, 30:18, 39:6</p> <p>uses ^[1] - 126:12</p>	<p style="text-align: center;">V</p> <p>valid ^[1] - 86:24</p> <p>validity ^[1] - 96:10</p> <p>varies ^[1] - 117:9</p> <p>various ^[5] - 4:2, 105:16, 176:17, 196:4, 204:12</p> <p>veer ^[1] - 149:22</p> <p>verdict ^[12] - 75:24, 76:14, 76:20, 76:21, 90:21, 92:15, 93:14, 93:16, 95:11, 95:20, 136:8, 151:9</p> <p>version ^[1] - 206:4</p> <p>versus ^[6] - 41:2, 72:14, 85:4, 89:23, 95:15, 172:20</p> <p>vicarious ^[5] - 89:3, 145:19, 146:4, 146:6</p> <p>video ^[9] - 17:15, 46:10, 121:2, 121:8, 123:6, 165:6, 165:9, 196:12, 196:20</p> <p>videographer ^[1] - 165:11</p> <p>videos ^[1] - 17:2</p> <p>view ^[22] - 12:20, 19:17, 32:7, 38:17, 41:15, 51:6, 66:16, 76:18, 104:10, 132:12, 132:16, 152:19, 176:13, 176:18, 177:22, 178:15, 179:1, 179:5, 179:12, 185:15, 187:13, 201:11</p> <p>viewed ^[1] - 17:1</p> <p>virtually ^[1] - 97:1</p> <p>visibility ^[1] - 18:23</p> <p>visible ^[10] - 53:5, 56:7, 57:18, 120:5, 121:11, 124:23, 125:14, 126:16, 126:21, 129:13</p> <p>visual ^[10] - 25:21, 30:19, 31:20, 33:15, 53:7, 124:24, 126:1, 126:12, 126:22, 128:4</p> <p>visualization ^[28] - 13:17, 30:20, 32:24, 33:18, 34:13, 34:15, 34:19, 40:13, 51:16, 58:8, 66:9, 66:11, 66:12, 66:15, 66:16, 66:18, 69:14, 69:15, 72:9, 81:4, 81:8, 81:13, 81:14, 149:2, 153:22, 153:24, 155:3, 179:16</p> <p>visually ^[3] - 31:12, 33:1, 57:14</p> <p>voir ^[3] - 204:2, 204:12, 206:13</p> <p style="text-align: center;">W</p> <p>wait ^[3] - 35:8, 118:20, 129:16</p> <p>waived ^[1] - 194:12</p> <p>wall ^[1] - 156:22</p> <p>wants ^[2] - 40:3, 141:18</p> <p>wasted ^[1] - 149:17</p> <p>watertight ^[2] - 125:13, 125:14</p> <p>ways ^[6] - 117:9, 117:18, 117:19, 118:4, 122:10, 167:13</p> <p>weak ^[1] - 75:15</p> <p>weaker ^[1] - 152:10</p> <p>week ^[1] - 185:5</p> <p>weekends ^[1] - 211:6</p> <p>weeks ^[13] - 68:6, 71:16, 132:1, 143:18,</p>
---	---	---

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(302) 658-6697 EMAIL: Dalehrs@aol.com

143:23, 165:19, 165:23, 166:5, 166:16, 166:21, 171:7, 175:2, 176:1 weigh [2] - 90:1, 175:16 weighing [1] - 176:5 weighted [1] - 134:14 welcome [2] - 3:19, 71:12 whatsoever [3] - 72:23, 76:12, 79:6 wheel [1] - 35:5 wheels [1] - 35:6 whereas [2] - 92:11, 96:19 whereby [1] - 208:17 WHEREOF [1] - 212:14 whole [22] - 4:7, 14:13, 23:4, 37:24, 58:1, 63:2, 64:7, 65:9, 67:6, 67:7, 68:1, 77:10, 83:10, 86:4, 113:16, 127:7, 127:8, 153:13, 172:19, 181:17, 202:14, 207:13 wholesale [1] - 62:7 wiggle [1] - 67:15 willing [4] - 67:9, 141:12, 154:20, 200:19 Wilmington [4] - 1:16, 208:3, 210:15, 212:16 win [3] - 67:10, 92:10, 92:12 wipe [1] - 63:1 Witcoff [1] - 3:9 WITCOFF [1] - 2:5 withdrawn [1] - 188:11 witness [46] - 87:17, 157:3, 157:13, 157:18, 157:23, 158:3, 158:17, 159:9, 160:3, 160:10, 164:9, 164:17, 165:13, 166:6, 166:9, 166:14, 166:17, 167:14, 167:15, 169:8, 170:17, 170:23, 174:1, 174:14, 175:18, 175:22, 191:12, 193:15, 193:23, 194:8, 194:14, 195:3, 195:5, 195:6, 196:9, 196:13, 197:2, 198:4, 198:5, 198:6, 198:7, 198:13, 199:2, 200:6, 208:5, 210:4 WITNESS [2] - 86:15, 212:14 witnesses [34] - 140:11, 158:2, 159:5, 159:8, 159:13, 159:17, 159:19, 159:20, 160:14, 161:21, 162:3, 163:19, 163:21, 168:5, 169:5, 175:7, 175:11, 196:4, 196:5, 198:18, 199:20, 201:3, 203:1, 207:6, 208:3, 208:10, 209:10, 209:14, 209:19, 209:20, 209:23, 210:21 woman [1] - 139:13 won [3] - 69:19, 74:7, 75:10 word [2] - 24:10, 66:11 wording [2] - 14:15, 98:3 words [5] - 11:16, 37:10, 44:1, 45:1, 178:2 works [3] - 17:2, 116:13, 165:10 worried [1] - 149:13 worse [1] - 200:6 wrapped [1] - 157:20 writing [1] - 192:4 written [18] - 13:14, 16:10, 26:20, 35:2, 35:7, 35:14, 79:19, 79:22, 83:7, 85:1	96:3, 132:2, 148:5, 153:1, 153:7, 154:18, 155:5, 176:3 Y year [2] - 97:9, 134:19 years [3] - 137:2, 141:9, 143:3 yesterday [11] - 5:15, 15:2, 32:12, 62:16, 70:13, 97:15, 141:20, 143:11, 158:10, 189:22, 201:14 YOUNG [1] - 2:3 Young [1] - 3:8 yourself [1] - 75:11 Z zero [1] - 115:2
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Hawkins Reporting Service

715 North King Street - Wilmington, Delaware 19801
(302) 658-6697 EMAIL: Dalehrs@aol.com

CERTIFICATE OF SERVICE

I, Karen L. Pascale, Esquire, hereby certify that on August 13, 2018, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF (which will send notification that such filing is available for viewing and downloading to all registered counsel), and in addition caused true and correct copies of the foregoing document to be served upon the following counsel of record by e-mail:

For Defendant HyperBranch Medical Technology, Inc.:

Thomas C. Grimm tgrimm@mnat.com
Jeremy A. Tigan jtigan@mnat.com
Stephen J. Kraftschik skraftschik@mnat.com
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899-1347

COOLEY LLP zHyperBranchIntegra@cooley.com

Jonathan Graves
Stephen C. Crenshaw
One Freedom Square
Reston Town Center
11951 Freedom Drive
Reston, VA 20190-5656

Adam Pivovar
Nicholas G. Lockhart
James P. Hughes
Naina Soni
Lisa Schwier
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004

/s/ Karen L. Pascale

Karen L. Pascale (#2903) [kpascale@ycst.com]
YOUNG CONAWAY STARGATT & TAYLOR LLP
1000 North King Street
Wilmington, DE 19801
Telephone: (302) 571-6600
Attorneys for Plaintiffs